Supreme Court, U. S.
FILED
OCT 10 1980
MICHAEL RODAK, JR., CLERK

80-578

No .....

IN THE

Supreme Court of the United States

October Term 1980

HARRY LLOYD MILHAN,

Petitioner,

vs.

MARY LEE MILHAN,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of California.

GARY R. RICKS,
J. TERRY SCHWARTZ,
200 East Carrillo Street,
P.O. Box B-B,
Santa Barbara, Calif. 93102,
(805) 962-0011,
Attorneys for Petitioner.

Of Counsel:
PRICE, POSTEL & PARMA.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

No .....

IN THE

Supreme Court of the United States

October Term 1980

HARRY LLOYD MILHAN,

Petitioner,

vs.

MARY LEE MILHAN,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of California.

Petitioner respectfully prays that a Writ of Certiorari issue to review the final judgment of the Supreme Court of the State of California

Questions Presented.

1. Whether federal military retired pay is community property subject to division with a non-military ex-spouse upon dissolution of marriage?

2. Whether a serviceman's election under 38 U.S.C. §3105 to receive a Veteran's Administration disability pension in lieu of military retired pay may be ignored and nullified by state marital property law?

3. Whether a state's evaluation of a National Service Life Insurance policy and a "compensatory" off-setting award of other property to a non-beneficiary ex-spouse during marital dissolution proceedings does not impermissibly interfere with the federal military compensation and insurance system?

TABLE OF CONTENTS

Page

Questions Presented i
Report of Opinion Below 1
Jurisdiction 1
Constitutional and Statutory Provisions Involved 1
Statement of the Case 1
Argument 4

I.

The Decision of the State Court Below Is in Conflict With Another State Decision on the Precise Issue Presented 4

II.

The Decision of the State Court Below Is in Conflict With Prior Decisions of This Court and Other Federal Courts 5

A. State Marital Property Law Cannot Constitutionally Be Applied to Federal Military Retired Pay in Light of Hisquierdo v. Hisquierdo 5

1. The Federal Military Retired Pay Program Has Substantially Similar Characteristics to the Railroad Retirement Scheme 6

2. State Community Property Claims to Military Retired Pay Interfere and Conflict With the Objectives of Supreme Federal Law 8

B. Community Property Claims Conflict With Federal Decisions Defining the Nature of Military Retired Pay 11

Page

C. Hisquierdo v. Hisquierdo Disapproved the Evaluation and "Off-Setting Award" Approach Required by the Judgment Below 12

D. The State Court Nullified Husband's Disability Pension Election 14

III.

The Decision of the State Court Below Involves Important Questions of Federal Law Which Should Be Settled by This Court 14

Conclusion 16

INDEX TO APPENDICES

Appendix A. Opinion of the California Supreme Court ..... App. p. 1

Appendix B. Pertinent Portions of United States Code, California Civil Code and United States Constitution 17

TABLE OF AUTHORITIES

Cases — Page

Arnold v. United States, 331 F.Supp. 42 (S.D. Tex. 1971) 8
Berkey v. United States, 361 F.2d 983 (Ct. Cl. 1966) 11
Cose v. Cose, 592 P.2d 1230 (Alaska 1979) 4, 5
Costello v. U.S., 587 F.2d 424 (9th Cir. 1978), cert. denied, 442 U.S. 929 (1979) 11
Ellis v. Ellis, 191 Colo. 317, 552 P.2d 506 (1976) 4
Fenney v. Fenney, 259 Ark. 858, 537 S.W.2d 367 (1976) 4
Fithian, In re Marriage of, 10 Cal.3d 592, 111 Cal.Rptr. 369, 517 P.2d 449 (1974) 2
Free v. Bland, 369 U.S. 663 (1962) 5, 6, 8
Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) 3, 4, 5, 6, 7, 8, 12, 13, 14, 15
Hostinsky v. United States, 292 F.2d 508 (Ct. Cl. 1961) 11
Lemly v. United States, 75 F.Supp. 248 (Ct. Cl. 1948) 11
Lynch v. United States, 292 U.S. 571 (1934) 11
Milhan, In re Marriage of, 13 Cal.3d 129, 117 Cal.Rptr. 809, 528 P.2d 1145 (1974), cert. denied, 421 U.S. 976 (1975) 2, 13
Milhan, In re Marriage of, 97 Cal.App.3d 41, 158 Cal.Rptr. 523 (1979) 2
Milhan, In re Marriage of, 27 Cal.3d 765 (1980) 4, 5, 12
Payne v. Payne, 82 Wash.2d 573, 512 P.2d 736 (1973) 4

Page

Ramsey v. Ramsey, 96 Idaho 672, 535 P.2d 53 (1975) 4
Ramsey, In re, 612 F.2d 1220 (9th Cir. 1980) 8
Stenquist, In re Marriage of, 21 Cal.3d 779, 148 Cal.Rptr. 9, 582 P.2d 96 (1978) 14
United States v. Hooper, 9 C.M.A. 637 (1958) 11
United States v. Larionoff, 431 U.S. 864 (1977) .. 7, 11
United States v. Smith, 393 F.2d 318 (5th Cir. 1968) 7, 8
Wissner v. Wissner, 338 U.S. 655 (1950) 8

Constitution

United States Constitution, Art. VI, Sec. 2 ..... 1, 6, 8

Miscellaneous

H.R. Rep. No. 11354, 95th Cong., 2d Sess. (1978) .. 15
H.R. Rep. No. 13020, 95th Cong., 2d Sess. (1978) .. 15
H.R. Rep. No. 2817, 96th Cong., 1st Sess. (1979) ... 15
S. Rep. No. 1480, 90th Cong., 2d Sess. (1968), reprinted in [1968] U.S. Code Cong. & Ad. News, pp. 3294, 3300, 3307 ..... 7, 8

Statutes

California Civil Code, Sec. 5105 9
California Civil Code, Sec. 5107 11
California Civil Code, Sec. 5108 11
California Civil Code, Sec. 5125(b) 9
United States Code, Title 5, Sec. 8345(j) 15
United States Code, Title 10, Secs. 1431-1446 9
United States Code, Title 10, Sec. 1431 ..... 1, 7

Page

United States Code, Title 10, Sec. 1434 ..... 1, 9, 10
United States Code, Title 10, Sec. 1435 10
United States Code, Title 10, Sec. 1440 ..... 1, 8, 13
United States Code, Title 10, Secs. 1447-1455 9
United States Code, Title 10, Sec. 1447 ..... 1, 7
United States Code, Title 10, Sec. 1447(3) 10
United States Code, Title 10, Sec. 1450 1
United States Code, Title 10, Sec. 1450(a)-(b) 9
United States Code, Title 10, Sec. 1450(b) 7, 9, 10
United States Code, Title 10, Sec. 2771 ..... 1, 9
United States Code, Title 10, Sec. 6323 ..... 1, 6
United States Code, Title 10, Sec. 6481 ..... 1, 11
United States Code, Title 10, Sec. 7601 1
United States Code, Title 10, Sec. 7601(a) 7
United States Code, Title 11, Sec. 522(b) 5
United States Code, Title 26, Sec. 104(a) 10
United States Code, Title 26, Secs. 3201-3233 6
United States Code, Title 28, Sec. 1257(3) 1
United States Code, Title 28, Sec. 2101(c) 1
United States Code, Title 31, Sec. 203 ..... 1, 8, 13
United States Code, Title 37, Sec. 701 1
United States Code, Title 37, Sec. 701(a) 8, 13
United States Code, Title 37, Sec. 701(c) 8, 13
United States Code, Title 37, Sec. 705 ..... 1, 8, 13
United States Code, Title 37, Sec. 801 1
United States Code, Title 37, Sec. 801(c) 11
United States Code, Title 38, Sec. 3101(a) 13
United States Code, Title 38, Sec. 3105 ..... i, 1, 10, 14

United States Code, Title 42, Sec. 659 12
United States Code, Title 42, Sec. 662(c) 12
United States Code, Title 45, Sec. 231a(c)-(d) 7
United States Code, Title 45, Sec. 231d(c)(3) 7
United States Code, Title 45, Sec. 231m 13

Report of Opinion Below.

The opinion of the California Supreme Court below, reported at 27 Cal.3d 765 (1980), is reproduced in Appendix A.

Jurisdiction.

The decision of the California Supreme Court sought to be reviewed was filed July 17, 1980. This petition was filed within the time specified in 28 U.S.C. §2101(c). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Constitutional and Statutory Provisions Involved.

United States Constitution, art. VI, cl. 2.

Petitioner was retired pursuant to 10 U.S.C. §6323, the pertinent parts of which are set out in Appendix B.

Pertinent portions of Title 10 U.S.C. §§1431, 1434, 1440 (Retired Serviceman's Family Protection Plan) and Title 10 U.S.C. §§1447, 1450 (Survivor Benefit Plan) are set forth in Appendix B.

The statutes protecting military retired pay and other benefits from diversion to non-military recipients, Title 10 U.S.C. §§2771, 7601, Title 31 U.S.C. §203, and Title 37 U.S.C. §§701, 705, 801 are contained in Appendix B.

Husband's disability pension election is secured by Title 38 U.S.C. §3105 set out in Appendix B.

Husband has continuing obligations and duties to the military as set forth in Title 10 U.S.C. §6481 in Appendix B.

Statement of the Case.

Husband and Wife were married in 1944 immediately following Husband's graduation from the United States

Naval Academy. After a military service career of over twenty years, Husband retired from the Navy in 1965.

At the time of marriage and throughout his military service, Husband was a permanent resident and domiciliary of the State of Colorado although, as military families must, the parties temporarily resided in several other states during this time. It was not until Husband retired after two decades of military service that the parties assumed permanent residence and domicile in the State of California.

In 1968, Wife commenced proceedings for dissolution of marriage and later moved to Idaho with some of the parties' minor children. To enable her to remarry, a decree of dissolution was entered on February 17, 1970.

In initial trial court and appellate proceedings, judgment was entered providing that Husband's military retired pay and certain military life insurance policies were his separate property. Ultimately, however, the California Supreme Court ruled that federal military retired pay could properly be subjected to state community property law, *In re Marriage of Fithian*, 10 Cal.3d 592, 111 Cal.Rptr. 369, 517 P.2d 449 (1974), and that the military servicemen's life insurance policies were amenable to similar treatment. *In re Marriage of Milhan*, 13 Cal.3d 129, 117 Cal.Rptr. 809, 528 P.2d 1145 (1974), *cert. denied*, 421 U.S. 976 (1975).

The remittitur of the California Supreme Court was filed on January 16, 1975, and over a year later, Wife filed motions in the trial court for judgment pursuant to the California Supreme Court decision, restitution after reversal and attorneys fees. After extended proceedings on these motions, the trial court entered judgment on March 7, 1978.

Despite Husband's objections throughout the proceedings, the trial court ruled that Husband's United States Navy retired pay and his military life insurance policies were

subject to a one-half community property interest of the Wife. Although not required to do so, the trial court made its judgment retroactive and ordered that Husband pay one-half of all military retired pay he had received between May, 1972, and March, 1978, together with one-half of all retired pay received thereafter. In addition, Husband was ordered to pay over one-half of the cash surrender value of his military serviceman's life insurance policy.

At no time has Wife demonstrated financial need for spousal support. Wife was, and is, a successful stock broker in Idaho and, although apparently now once again divorced, was married throughout most of the proceedings to an investment company executive.

On July 17, 1980, following extended appellate proceedings,[1] the California Supreme Court affirmed the trial court judgment and held that despite this Court's decision in *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), California was not precluded from applying its community property law to military retired pay, military insurance policies, or veterans disability pay received in lieu of retired pay.

---

[1]The California Court of Appeal, Second District, relying on this Court's *Hisquierdo* decision, reversed the trial court and ruled in favor of Husband, that his military retired pay, life insurance policies and disability pension were not subject to community claims. *In re Marriage of Milhan*, 97 Cal.App.3d 41, 158 Cal.Rptr. 523 (1979). That decision was vacated, however, when the California Supreme Court granted its hearing in the case.

ARGUMENT.

I.

THE DECISION OF THE STATE COURT BELOW IS IN CONFLICT WITH ANOTHER STATE DECISION ON THE PRECISE ISSUE PRESENTED.

Relying on this Court's decision in *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), the Alaska Supreme Court held in *Cose v. Cose*, 592 P.2d 1230 (Alaska 1979), that federal military retired pay was not marital property divisible on dissolution of marriage.[2] Other states have reached a substantially similar result. *Ellis v. Ellis*, 191 Colo. 317, 552 P.2d 506 (1976); *Fenney v. Fenney*, 259 Ark. 858, 537 S.W.2d 367 (1976).

In stark contrast, the California Supreme Court ruled below that despite *Hisquierdo v. Hisquierdo*, and recent federal legislation the state was "not precluded" from application of its community property law to military retired pay, military insurance policies, or veteran's disability pay received in lieu of retired pay. *In re Marriage of Milhan*, 27 Cal.3d 765, 780 (1980).

Other states have also reached California's result. *See, e.g., Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975); *Payne v. Payne*, 82 Wash.2d 573, 512 P.2d 736 (1973).

The result of this haphazard patchwork state of the law falls particularly hard on career military personnel. Unlike virtually any other occupation or employment one can name, the military serviceman is subject to recurring obligations to relocate himself, and often his family, all over the United States and to many corners of the world. The serviceman

---

[2]*Cose* is presently before this Court on petition for writ of certiorari. Docket Number 79-1469.

is not free to choose the jurisdiction in which he will be assigned for duty or to refuse a duty assignment once made.

The property consequences are apparent and profound. Depending upon where the serviceman is assigned, the military retired pay which is earned can be treated as non-divisible separate property income or marital property to which the non-military ex-spouse has a continuing and unfettered claim.

Fundamentally, it is federal law that must govern the interpretation of a federal right. *Free v. Bland*, 369 U.S. 663, 669-70 (1962). The right to receive military retired pay must, accordingly, not be subjected to varied and conflicting interpretations and applications at the hands of the several states effecting their parochial approaches to marital property law.[3]

The conflict among the approaches of the various states to the treatment of federal military retired pay on dissolution of marriage has existed for some time. However, that conflict has become even more pronounced with the decisions in *Cose* and *Milhan* which have interpreted this Court's opinion in *Hisquierdo* in completely different ways. The Court's review is both appropriate and necessary to settle the issue once and for all.

II.

THE DECISION OF THE STATE COURT BELOW IS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS.

A. State Marital Property Law Cannot Constitutionally Be Applied to Federal Military Retired Pay in Light of Hisquierdo v. Hisquierdo.

In *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), this Court held that certain federal Railroad Retirement Act ben-

---

[3]As recently as its major legislative effort on the Bankruptcy Act of 1978, Congress recognized explicitly the benefits accruing when a federal scheme is not left solely to the push and pull of state law: now, a debtor may elect a schedule of *federal* property exemptions rather than the state exemptions which vary widely. *See* 11 U.S.C. §522(b).

efits were not subject to state community property claims and it reversed the California Supreme Court which had ruled that they were.

In its consideration of *Hisquierdo*, the Court was compelled by the Supremacy Clause (U.S. Const., art. VI, §2) to determine whether a conflict existed between state community property concepts and overriding federal law. The inquiry was straightforward and guides the analysis here:

> "The pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition." *Hisquierdo v. Hisquierdo*, 439 U.S. at 583.

1. The Federal Military Retired Pay Program Has Substantially Similar Characteristics to the Railroad Retirement Scheme.

As an aid in determining the objectives of the federal benefit program in *Hisquierdo*, this Court identified the significant attributes of the federal Railroad Retirement scheme. In every material respect, the federal Railroad program is virtually identical with the military retired pay system; accordingly, the latter should be equally shielded from interference by conflicting state property laws.

From their inception, Railroad Retirement benefits and military retired pay both have "federal overtones," *Hisquierdo v. Hisquierdo*, 439 U.S. at 582; 10 U.S.C. §6323, and are thus markedly distinguishable from situations in which state community property assets are utilized to purchase federal savings bonds or the like. *See, e.g., Free v. Bland*, 369 U.S. 663 (1962). Further, it can be said of both Railroad and military retired benefits that "[c]ompulsory federal taxes finance them and not just the taxes that fall on the employee." *Hisquierdo v. Hisquierdo*, 439 U.S. at 582. Indeed, unlike the Railroad worker who pays a specific tax to fund his retirement plan, 26 U.S.C. §§3201-3233,

the military officer makes no specific contribution toward his retired pay. Thus, in that respect the military retired system is even more completely a federal creature than is the Railroad retirement program.

The Court noted, too, that federal Railroad retirement is not contractual. Likewise, federal military retired pay "is not based upon an express or implied contract, but is governed entirely by statute." *United States v. Smith,* 393 F.2d 318, 321 (5th Cir. 1968); *see U.S. v. Larionoff,* 431 U.S. 864 (1977).

The Court stressed that the spouse (and other dependents) were specifically provided for in the Railroad Retirement scheme. *See* 45 U.S.C. §231a(c)-(d). It observed, however, that such benefits were cut off when the railroad worker and the spouse were divorced. 45 U.S.C. §231d(c)(3). The military retirement program also provides for the wife and dependents of the retired serviceman, *see* 10 U.S.C. §§1431, 1447, and, significantly, the entitlement to such benefits terminates in the event of remarriage. 10 U.S.C. §1450(b). Medical, commissary and exchange privileges available to the retired servicemen and their widows are not available to an ex-wife. *See* 10 U.S.C. §7601(a).

In the Court's view the critical provisions of the Railroad Retirement Act included its identification of a specified beneficiary who is protected by a prohibition against attachment and anticipation of the benefits. *Hisquierdo v. Hisquierdo*, 439 U.S. at 582. The retired serviceman is, of course, the specified beneficiary of military retired pay; indeed, Congress has even referred to military retired pay as the serviceman's "personal entitlement." S. Rep. No. 1480, 90th Cong., 2d Sess. (1968), *reprinted in* [1968] U.S. Code Cong. & Ad. News 3294, 3300. In addition, the serviceman's retired pay is protected by not merely one but an entire array of statutory bars to its diversion elsewhere

than to the member himself. *See, e.g.*, 37 U.S.C. §§701(a), (c), 705; 10 U.S.C. §1440; 31 U.S.C. §203. In this particular regard, Congress has clearly indicated its intent to take whatever steps may be necessary to "safeguard the [retired serviceman's] future retired pay . . . ." [1968] U.S. Code Cong. & Ad. News, *supra* at 3307. *See also United States v. Smith*, 393 F.2d 318 (5th Cir. 1968); *Arnold v. United States*, 331 F.Supp. 42 (S.D. Tex. 1971).

In sum, the military retired pay program established and administered by the federal government exhibits characteristics—including benefits, recipients covered, and protections—which are not materially different from those of the Railroad Retirement Act analyzed by this Court in *Hisquierdo*. *See In re Ramsey*, 612 F.2d 1220, 1221 n. ! (9th Cir. 1980). Indeed, in the areas addressed by the Court, Congress has been equally careful in extending, shaping and defining the nature and scope of the federal rights it creates.

2. State Community Property Claims to Military Retired Pay Interfere and Conflict With the Objectives of Supreme Federal Law.

The ultimate question for disposition here is the same as that framed in *Hisquierdo:* Whether the asserted state property right conflicts with federal law and injures the "objectives" of the federal program. As will be shown, recognition of a community property claim to military retired pay accomplishes precisely what supreme law forbids: There is a resultant interference with the Congressional allocation of limited federal benefits. When federal objectives are thus thwarted, the state law must give way. U.S. Const., art. VI, §2; *Free v. Bland*, 369 U.S. 663 (1962); *Wissner v. Wissner*, 338 U.S. 655 (1950).

Recognition of a community property claim in federal military benefits not only "conflicts" with a number of the

Congressional objectives embodied in the military retirement scheme, it would frustrate them entirely:

a. *Beneficiary Designation*. Congress has specifically given the serviceman the paramount right to designate, effective upon his death, a beneficiary who is entitled *above all others* to receive pay arrearages or other amounts due in a final settlement of his accounts. 10 U.S.C. §2771. If state community property claims to military retired pay were valid, the serviceman could not, of course, unilaterally divest the wife's rights in it. *See* Cal. Civ. Code §§5105, 5125(b). Yet, this is what Congress has specifically authorized in recognition that the serviceman's pay is his "personal entitlement." Clearly, a state community property claim is irreconcilable to the federal objective and, if given effect, would frustrate that objective altogether.

b. *Annuity Plans*. Congress has specifically given the serviceman the unfettered right to use up to fifty percent of his military retired pay to purchase annuities which are payable on his death to beneficiaries he alone specifies. 10 U.S.C. §§1431-1446. (Retired Serviceman's Family Protection Plan); 10 U.S.C. §§1447-1455 (Survivor Benefit Plan). The federal annuity scheme provides for a range of permissible beneficiaries which need not include the spouse. *See* 10 U.S.C. §1434; 10 U.S.C. §1450(a)-(b). But, if a state law community property interest in the retired pay were recognized, the spouse could object to the use of "her" property for an annuity in which she did not share and thereby frustrate the Congressional plan.

Congress clearly had the former spouse in mind when it enacted these plans. Under the Survivor Benefit Plan, for example, the annuity—purchased with retired pay in which the spouse may be claiming a perfected state law property interest—ends if the serviceman's widow remarries. 10 U.S.C. §1450(b). In still further expression of its intent to

protect surviving *dependents*—and not a remarried *former spouse*—Congress has specifically defined the "widow" who is entitled to the annuity as the surviving "wife." 10 U.S.C. §1447(3). The same distinctions have been drawn by Congress in the Family Protection Plan provisions. 10 U.S.C. §§1434, 1435. Once again, if the state community property claim were given effect, it would completely frustrate the Congressional plan.

A pertinent policy aspect of the annuity plans is observed in the Survivor Benefit Plan under which the annuity to the serviceman's *widow* is ended on her remarriage. 10 U.S.C. §1450(b). Yet, if an ex-wife's community property claim to the retired pay were given effect, it would become at dissolution her separate property and would—as the judgment below provides[4]—continue despite her remarriage. Inasmuch as Congress has demonstrably elected *not* to provide for the ex-wife, it is necessary to conclude either that those who are express beneficiaries of Congress' protection (servicemen's widows) are to be treated worse than those it neglected (ex-wives), or, more logically, that those it neglected were never intended to have any community property claim.

c. *Disability Benefit Conversion*. Congress has afforded the serviceman the statutory right to waive all or some lesser part of his retired pay to receive a disability pension from the Veteran's Administration. 38 U.S.C. §3105. While the primary incentive for such a waiver might be advantageous tax treatment, 26 U.S.C. §104(a), or shielding the disability pension from Husband's creditors, another consequence also flows from the serviceman's disability election. Under fed-

---

[4]Wife has long since remarried; yet, the judgment provides for her continued receipt of one-half of Husband's military retired pay as he receives it in the future.

eral law, the retired pay—subject to the alleged state community property law claim—would, as disability benefits, become a "gratuity," *see, e.g., Lynch v. United States,* 292 U.S. 571, 577 (1934); *Berkey v. United States,* 361 F.2d 983, 987-88 (Ct. Cl. 1966), which is separate property, Cal. Civ. Code §§5107, 5108, not subject to claims of the other spouse. The judgment below nullifies the disabled Husband's election in this regard.

B. Community Property Claims Conflict With Federal Decisions Defining the Nature of Military Retired Pay.

Following this Court's decision in *U.S. v. Larionoff,* 431 U.S. 864 (1977), the Court of Appeals for the Ninth Circuit held that military retired pay "does not differ from active duty pay in its character as pay for *continuing military service.*" *Costello v. U.S.,* 587 F.2d 424 (9th Cir. 1978), *cert. denied,* 442 U.S. 929 (1979) (emphasis added). Indeed, military retired pay has long been considered to be compensation paid in consideration of the serviceman's continued availability to the military establishment. *See, e.g., Hostinsky v. United States,* 292 F.2d 508, 510 (Ct. Cl. 1961); *Lemly v. United States,* 75 F.Supp. 248, 249 (Ct. Cl. 1948).

The judicial recognition that a retired military serviceman receives his retired pay for continuing services to the country is well-founded. At the outset of his retirement, Husband was restricted in the businesses he could pursue and would have forfeited his retired pay if his conduct was in violation of law. 37 U.S.C. §801(c). On a continuing basis, he is obligated to submit to recall to active duty in the service of his country. 10 U.S.C. §6481. Indeed, Husband is still considered to be a member of the armed services. *See, e.g., United States v. Hooper,* 9 C.M.A. 637 (1958).

The vice of a state-imposed marital property claim is that it inequitably casts upon *one* member of the former marital community the continuing burdens of earning the military retired pay which is enjoyed by *both*. If the retired pay system is to successfully function as a career incentive and an inducement for the post-retirement lifetime availability to the military of the knowledge and experience represented in the pool of retired servicemen, then the retired pay cannot be diverted to an ex-spouse who does not contribute to earning it.

Non-division of retired pay, moreover, does not result in injustice because, as this Court pointed out in *Hisquierdo*, marital *support*—which would take into account the military member's ability to pay as well as the ex-spouse's demonstrated need—would still be a remedy available to state courts.[5]

C. Hisquierdo v. Hisquierdo Disapproved the Evaluation and "Off-Setting Award" Approach Required by the Judgment Below.

In *Hisquierdo* this Court specifically disapproved the *Milhan* "evaluation and award of other property" approach to avoiding conflicts with supreme federal law. *Hisquierdo v. Hisquierdo*, 439 U.S. at 588. In addition, in analysis relevant here, it struck down the retention of jurisdiction by the state court to enforce payments of the federal benefits as they were received.

Justice Blackmun noted a number of infirmities to the state court *Hisquierdo* judgment which are equally present here. First, like the single provision in the Railroad Retire-

---

[5]The 1975 and 1977 amendments to the Social Security Act—discussed in *Hisquierdo*—reflect precisely this "support" approach to state marital property claims, as opposed to a "property division" approach. *See* 42 U.S.C. §§659, 662(c).

ment Act, 45 U.S.C. §231m, a panoply of statutes protect federal military retirement benefits from diversion, *see, e.g.*, 37 U.S.C. §§701(a), (c), 705; 10 U.S.C. §1440; 31 U.S.C. §203; 38 U.S.C. §3101(a), and those statutes preempt all state law in their way. Second, the federal military retirement scheme involves carefully targeted benefits (*e.g.*, enhanced retired pay schedules, dependent annuity benefits which terminate on remarriage, disability pension options), one of the primary objectives of which is to induce careers in the military services. Together, as in *Hisquierdo*, these characteristics reflect Congress' care in the husbanding of finite federal benefit funds. A state court judgment requiring payment of those funds as periodically received would directly frustrate that legislative program.

Hisquierdo is directly pertinent with respect to the state court's recognition of a community property interest in Husband's military life insurance policies.

Substantively, the Court indicated that the Congressional protections afforded to military life insurance policies are similar in nature and scope to those found in the Railroad Retirement Act. *Hisquierdo v. Hisquierdo*, 439 U.S. at 582. Consequently, the solicitude for the recipients of federal Railroad Retirement benefits evidenced in *Hisquierdo* must guide the inquiry here.

Procedurally, the decision in *Hisquierdo* is equally significant. Responding to the argument that a *Milhan* (*In re Marriage of Milhan*, 13 Cal.3d 129 (1974)) "offsetting award" approach to receipt of the asserted community share in the federal benefits could avoid interference with the federal scheme, the Court stated:

> "An offsetting award, however, would upset the statutory balance and impair petitioner's economic security just as surely would a regular deduction from

his benefit check." *Hisquierdo v. Hisquierdo,* 439 U.S. at 588.

Despite this guidance, the California Supreme Court has persisted in its use, with respect to Husband's military service life insurance policies, of the very evaluation and "offsetting award" approach found defective in *Hisquierdo.*

D. The State Court Nullified Husband's Disability Pension Election.

In its decision below, the California Supreme Court explicitly nullified Husband's disability pension election and deemed the pension he receives for his military service disability to be a property interest divisible with his ex-spouse. Thus, the disabled serviceman here must share one-half of his disability pension with Wife although she patently requires no compensation—as Husband is surely entitled to—for disabling conditions arising from service to the country.

The federal disability election is granted by Congress without restrictions as to its time of exercise or its consequences. 38 U.S.C. §3105. Yet, the California court's application here of the rule it established in *In re Marriage of Stenquist,* 21 Cal.3d 779, 148 Cal.Rptr. 9, 582 P.2d 96 (1978), ignores and effectively nullifies that election. In the eyes of the state court, it is as if the election rights secured by supreme federal law did not exist.

III.

THE DECISION OF THE STATE COURT BELOW INVOLVES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

As outlined in previous sections, the case law defining marital property rights in military retired pay is in conflict

from jurisdiction to jurisdiction and between the state and federal courts. Unfortunately, legislative guidance provides little additional assistance.

This Court's opinion in *Hisquierdo* analyzed the impact of the 1975 and 1977 amendments to the Social Security Act but military retired pay has yet to be construed in their light. If this legislation accurately reflects a Congressional balance between state marital property interests and federal fiscal interests then the analysis should be applicable in the context here under consideration.

It is noteworthy, too, that Congress has explicitly recognized community property claims but only to the limited extent that Civil Service Retirement pay is now subject to property division for community property purposes. 5 U.S.C. §8345(j). In stark contrast, bill after bill has been introduced over the last few years to recognize a community property claim in military retired pay but none has ever been reported out of committee. *See* H.R. Rep. No. 2817, 96th Cong., 1st Sess. (1979); H.R. Rep. No. 11354, 95th Cong., 2d Sess. (1978); H.R. Rep. No. 13020, 95th Cong., 2d Sess. (1978).

With legislative resolution of the issue not apparently likely in the foreseeable future and with the judge-made law in disarray, the thousands of servicemen and their families are left without authoritative guidance in this important area. Moreover, at a time when success of the all-volunteer military is in doubt and the services face the challenge of retaining experienced career personnel, the need to define the nature and scope of rights to military benefits—retired pay, life insurance and disability pensions—has become particularly acute. The matter now before the Court presents the opportunity of resolving these vital questions.

Conclusion.

For the foregoing reasons, a Writ of Certiorari should issue to review the decision of the Supreme Court of California in this action.

Dated: October 9, 1980.

Respectfully submitted,

GARY R. RICKS,

J. TERRY SCHWARTZ,

Attorneys for Petitioner.

PRICE, POSTEL & PARMA,

Of Counsel.

APPENDICES

APPENDIX "A".

[L.A. No. 31191, July 17, 1980.] In re the Marriage of MARY LEE and HARRY LLOYD MILHAN. MARY LEE MILHAN, Appellant, v. HARRY LLOYD MILHAN, Appellant.

OPINION

BIRD, C. J.—The principal issue in this dissolution action is whether the Supreme Court in *Hisquierdo v. Hisquierdo* (1979) 439 U.S. 572 [59 L.Ed.2d 1, 99 S.Ct. 802], implicitly held that community property states could not apply their laws in dividing as part of the community a husband's military pension, insurance policy, and disability pay which he received in lieu of retirement.

I.

Following his graduation from the United States Naval Academy in 1944, Mr. Milhan married Mrs. Milhan. The Milhans' marriage was dissolved in 1970, five years after Mr. Milhan retired from the Navy and began receiving retirement pay. In 1972, Mr. Milhan was awarded as separate property his retirement pension and two military insurance policies which had been purchased with community funds.

This court reversed that judgment in *In re Marriage of Milhan* (1974) 13 Cal.3d 129 [117 Cal.Rptr. 809, 528 P.2d 1145], certiorari denied (1975) 421 U.S. 976 [44 L.Ed.2d 467, 95 S.Ct. 1976]. (*Milhan I.*) Relying on *In re Marriage of Fithian* (1974) 10 Cal.3d 592 [111 Cal.Rptr. 369, 517 P.2d 449], certiorari denied (1974) 419 U.S. 825 [42 L.Ed.2d 48, 95 S.Ct. 41], this court held that Congress had not preempted the application of California community property law to federal military pensions. The court also rejected the claim that *Wissner v. Wissner* (1950) 338 U.S. 655 [94 L.Ed. 424, 70 S.Ct 398] required California to

classify military insurance policies as separate property. A federal interest was recognized in protecting a serviceman's right to specify the beneficiary of a military insurance policy. However, California courts could nonetheless evaluate "the community interest in a military life policy and award [] the insured's spouse an equivalent amount in *other* property available for disposition. [Fn. omitted.]" (*Milhan I, supra,* 13 Cal.3d at p. 133.)

This court issued its remittitur, and a hearing was held by the trial court. Mr. Milhan testified that he had elected to receive $106 disability compensation from the Veterans' Administration in lieu of an equal amount of retirement pay. The trial court awarded Mrs. Milhan half of Mr. Milhan's retirement pay, as well as a sum equivalent to half of the cash surrender value of the military insurance policies at the time of trial. Mrs. Milhan was also awarded restitution for one-half of the retirement pay received by Mr. Milhan after May 2, 1972.[1] Mr. Milhan's Veterans' Administration disability pay was not included in the judgment.

Relying on the post-*Milhan I* decision in *Hisquierdo v. Hisquierdo, supra,* 439 U.S. 572,[2] Mr. Milhan appealed contending that the award to Mrs. Milhan of pension funds

---

[1]The trial court awarded Mrs. Milhan the legal rate of interest on her half of the retirement pay due on and after May 2, 1972, as well as on the amount due in lieu of her share in the insurance policies. The trial court provided that the interest would be computed from the date on which this court's remittitur was filed. Mr. Milhan was allowed to make monthly payments totalling $300 in lieu of lump sum restitution of retirement benefits received between May 2, 1972, and February 1976, and in lieu of immediate payment of half of the cash surrender value of the insurance policies. Mrs. Milhan was awarded attorneys' fees of $1,500.

[2]The Supreme Court reversed the decision of this court in *In re Marriage of Hisquierdo* (1977) 19 Cal.3d 613 [139 Cal.Rptr. 590, 566 P.2d 224], and remanded the case for further proceedings not inconsistent with its opinion.

and of property equivalent to her community property interest in the military insurance policies was error. He also claimed the court erred when it awarded interest and attorneys' fees and refused certain credits against the award of back pay.[3] Mrs. Milhan cross-appealed, attacking the trial court's failure to award her a community property share in the Veterans' Administration disability pay received by Mr. Milhan in lieu of retirement pay, and the court's failure to divide the retirement pay from the date of trial in 1970.[4]

II.

In *Hisquierdo v. Hisquierdo, supra,* 439 U.S. 572, the Supreme Court considered whether the supremacy clause[5] precludes state courts from applying community property law to pensions payable under the federal Railroad Retirement Act of 1974. (45 U.S.C. § 231 et seq.) The court found that benefits under the act were provided to "support . . . [former] employees[] [in their] old age and to encourage . . . employee[s] to retire." (*Hisquierdo, supra,* 439 U.S. at p. 585 [59 L.Ed.2d at p. 13].) Application of state community property law, the court reasoned, would frustrate

---

[3]In addition, Mr. Milhan argued that the trial court erred in failing to make any provision regarding his obligations with respect to the military retirement pay if Mrs. Milhan should predecease him. However, California law is clear that "the heirs of the ex-wife are not entitled to the portion of the retirement benefits the ex-wife would have received had she lived." (*In re Marriage of Fithian, supra,* 10 Cal.3d at p. 601.) There was no need for the trial court to restate this principle in the judgment.

[4]Mrs. Milhan's contention that the decision in *Milhan I* is the final law of the case is incorrect inasmuch as *Hisquierdo* was decided while the appeal herein was pending. (See *Subsequent Injuries Fund v. Ind. Acc. Com.* (1960) 53 Cal.2d 392, 395 [348 P.2d 193].)

[5]"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (U.S. Const., art. VI, cl. 2.)

the congressional objective in two ways. First, the reduction of benefits would *discourage* the employee from retiring. Second, state law would *encourage* divorced employees to "keep working, because [their] former spouse[s] [have] no community property claim to salary earned after the marital community is dissolved." (*Ibid.*) Accordingly, the court held that 45 United States Code section 231m precludes both the division of railroad pensions as community property and the award of an equivalent amount of other property to the nonemployee spouse.[6]

(1) The Supreme Court has long recognized that the " 'whole subject of the domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States.' " (*Hisquierdo, supra,* 439 U.S. at p. 581 [59 L.Ed.2d at pp. 10-11] (citation omitted); see also Reppy, *Community and Separate Interests in Pensions and Social Security Benefits After Marriage of Brown and ERISA* (1978) 25 UCLA L.Rev. 417, 483-485.) Accordingly, federal preemption will apply only where " 'positively required by direct enactment' " (*Hisquierdo, supra,* 439 U.S. at p. 581 [59 L.Ed.2d at p. 11], citation omitted), and only insofar as necessary to protect specific federal interests. "State family and family-property law must do

---

[6]The Railroad Retirement Act provides a separate benefit to nonemployee spouses which is terminated upon dissolution of the marriage. (45 U.S.C. § 231d(c)(3).) The court found this termination to manifest a "deliberate" congressional choice to exclude nonemployee spouses from any community property claim to the pension provided employees. (*Hisquierdo, supra,* 439 U.S. at p. 585 [59 L.Ed.2d at p. 13]. See discussion *infra,* pp. 774-775.

The broad language of 45 United States Code section 231m protects this congressional allocation of benefits: "Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated. . . ."

'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden.'' (*Id.* Citation omitted.) ''The pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition.'' (*Hisquierdo, supra,* 439 U.S. at p. 583 [59 L.Ed.2d at p. 12].)

Mr. Milhan contends that *Hisquierdo, supra,* 439 U.S. 572, governs the assets divided by the trial court in this case. (2) Specifically, he claims that neither military retirement pay nor disability pay received in lieu thereof may be divided as community property. Further, California courts may not award an equivalent amount from other property to compensate for a community property interest in military insurance policies. In effect, Mr. Milhan contends that *Hisquierdo* implicitly disapproved this court's holdings in *In re Marriage of Fithian, supra,* 10 Cal.3d 592,[7] *In re Marriage of Stenquist* (1978) 21 Cal.3d 779 [148 Cal.Rptr. 9, 582 P.2d 96], and *Milhan I, supra,* 13 Cal.3d 129. However, the principles which required preemption in *Hisquierdo* yield a different result when applied to the facts of this case.

In *Fithian,* this court found that ''California community property law [does not] interfere[] in any way with the administration or goals of the federal military retirement pay system. . . .'' (*Fithian, supra,* 10 Cal.3d at p. 604.) Accordingly, the court held that state law was not preempted.

---

[7]Citing *Gorman v. Gorman* (1979) 90 Cal.App.3d 454 [153 Cal.Rptr. 479], this court indicated in *Henn v. Henn* (1980) 26 Cal.3d 323, at page 328, footnote 3 [161 Cal.Rptr. 502, 605 P.2d 10], that *Hisquierdo* does ''not compel reconsideration of our holding in *Fithian*. . . .'' However, the issue was not briefed by the parties in *Henn,* and the court's reasons for so holding have not been fully explained.

Nothing in *Hisquierdo* conflicts with this conclusion. Military retirement pay was enacted, inter alia, to "provide [servicemen] with an incentive to *remain* in the armed services. . . ." (*Id.*, at p. 599. Italics added.) The federal interest which required preemption in *Hisquierdo*—an incentive for pension holders to retire—does not exist in the military retirement system.[8]

Hisquierdo is also consistent with this court's conclusion in *Fithian* that Congress did not intend "to preserve the benefits of the [military retirement] system as the separate property of the recipient." (*Fithian, supra,* 10 Cal.3d at p. 599.) The Supreme Court's finding of congressional intent to preempt community property laws applicable to railroad retirement pensions rested on two principal grounds. Neither applies to military pensions.

First, *Hisquierdo* relied on the statutory immunity of railroad pensions from taxation, attachment, garnishment, as-

---

[8]Mr. Milhan repeats many of the arguments rejected in *Fithian*. For example, he contends that application of state community property principles to military pensions is inconsistent with the right of servicemen to designate a beneficiary to receive pay arrearages or other amounts due on their death in settlement of their accounts. (10 U.S.C. § 2771.) Further, he argues that California law interferes with the right of servicemen to use a portion of their pay to purchase annuities payable on their death to beneficiaries including persons other than a spouse. (10 U.S.C. § 1431 et seq. [Retired Serviceman's Family Protection Plan]; 10 U.S.C. § 1447 et seq. [Survivor Benefit Plan].) Since *Hisquierdo* sheds no new light on these contentions, there is no need to supplement the discussion in *Fithian*.

Mr. Milhan also contends that the decision of the United States Court of Appeals in *Costello v. United States* (9th Cir. 1978) 587 F.2d 424, established that military retirement benefits are paid in consideration of continued services to the military establishment. *Costello* held that retired military personnel have no vested right to retired compensation at the rate in effect on the date of their retirement. This holding rested principally upon the finding that military retirement pay is not received entirely for past services. However, the issue in *Costello* was far removed from the problem of classifying retirement benefits under state community property law, and is not authoritative on the latter issue. (See *Fithian, supra,* 10 Cal.3d at p. 603.)

signment, and other "legal process." (45 U.S.C. § 231m.) This statute also prohibits the "anticipation" of railroad pension benefits. (*Id.*) Counsel have not cited, nor has independent research revealed, any federal statute which similarly shields military pensions. Thus, Congress has not " 'positively' " and " 'by direct enactment' " precluded California courts from applying community property rules to such pensions (*Hisquierdo, supra,* 439 U.S. at p. 581 [59 L.Ed.2d at p. 11], quoting *Wetmore v. Markoe* (1904) 196 U.S. 68, 77 [49 L.Ed. 390, 394, 25 S.Ct. 172].)[9]

Second, *Hisquierdo* relied on the provision of a separate benefit for spouses which is terminated on dissolution of marriage. (45 U.S.C. § 231d(c)(3).) The court stated: "Congress carefully targeted the benefits created by the

---

[9]10 United States Code section 1440 applies only to annuities payable under the Retired Serviceman's Family Protection Plan. (10 U.S.C. § 1431 et seq.) It is not applicable to Mr. Milhan's Navy retirement pay. (Accord *Czarnecki v. Czarnecki* (1979) 123 Ariz. 466 [600 P.2d 1098]; *In re Marriage of Musser* (1979) 70 Ill.App.3d 706 [388 N.E.2d 1289].) Since military retirement pensions are not administered by the Veterans' Administration, they are also outside the scope of 38 United States Code section 3101. Mr. Milhan cites only four other provisions. 37 United States Code section 701(a) and (b) allows Army and Air Force officers and certain contract surgeons to assign their pay pursuant to appropriate regulations, while section 701(c) forbids enlisted personnel from these services from doing so. 31 United States Code section 203 applies only to the transfer and assignment of claims against the United States.

Mr. Milhan forcefully contends that a congressional intent to preempt state community property law applicable to military retirement pay is established by two recent amendments to the Social Security Act, codified at 42 United States Code sections 659 and 662(c). These amendments apply to 45 United States Code section 231m and "similar provisions in all other federal benefit plans." (*Hisquierdo, supra,* 439 U.S. at p. 576 [59 L.Ed.2d at p. 7].) The amendments create an exception for child support and alimony claims, with "alimony" defined to explicitly exclude community property claims. However, since military retirement pay is not shielded by any statute similar to 45 United States Code section 231m, the scope of the exception created by these amendments, and the policy implications, if any, to be drawn are not material to this case.

Railroad Retirement Act. It even embodied a community concept to an extent. The Act provides a benefit for a spouse, but the spouse need not have worked for a carrier. The spouse's sole contribution is to the marital community that supports the employee who has made railroad employment a career. Congress purposefully abandoned that theory, however, in allocating benefits upon absolute divorce. In direct language the spouse is cut off. . . ." (*Hisquierdo, supra,* 439 U.S. at p. 584 [59 L.Ed.2d at p. 13].) The court further emphasized that "[d]ifferent considerations might well apply where Congress has remained silent on the subject of benefits for spouses, particularly when the pension program is a private one which federal law merely regulates." (*Id.*, at p. 590, fn. 24 [59 L.Ed.2d at p. 16].)

It is irrelevant that the military retirement scheme is a public program. The scheme does not contain a separate spousal benefit which is purposefully cut off upon dissolution. Instead, the scheme contains two different annuity plans, the Retired Serviceman's Family Protection Plan (10 U.S.C. § 1431 et seq.), and the Survivor Benefit Plan (10 U.S.C. § 1447 et seq.). The serviceman may elect not to participate in either plan. (10 U.S.C. §§ 1431(b), 1448(a).) Both plans allow the serviceman to designate the surviving children as the beneficiaries, instead of the spouse.[10] (10 U.S.C. §§ 1434(a), 1450(a).) Unlike the railroad retirement scheme, these annuities are not payable until the serviceman's death. Nor is a surviving spouse's annuity absolutely

---

[10]An unmarried serviceman with no dependent children may designate any natural person with an insurable interest in him as the beneficiary under the Survivor Benefit Plan. (10 U.S.C. §§ 1450(a)(4), 1448(b).) Mr. Milhan allots $7.66 out of each retirement paycheck towards the purchase of an annuity payable to his surviving children until they reach 18 years of age. As of the postremittitur hearing, only one child remained eligible to receive this benefit. Mrs. Milhan has not been designated as a beneficiary.

cut off even upon remarriage. The spouse may continue receiving an annuity if the remarriage occurs after the spouse reaches age 60. (10 U.S.C. §§ 1434(a), 1450(b).) If a remarriage entered into prior to age 60 is dissolved, the spouse may resume receiving an annuity due under the Survivor Benefit Plan. (10 U.S.C. § 1450(b).)

Both the structure and the legislative history of the annuity plans available for military spouses indicate that they were designed to alleviate hardship caused by the serviceman's death. (See 1972 U.S. Code Cong. & Admin. News, at pp. 3288-3328.) Thus in contrast to the Railroad Retirement System, Congress did not enact a spousal benefit designed to reflect the contribution of military spouses to the marital community. Accordingly, there is no basis for inferring a congressional intent to cut off the California community property rights of military spouses. As stated in *Fithian, supra,* 10 Cal.3d at page 600, "Congress' concern for the welfare of soliders' widows sheds little light on Congress' attitude toward the community treatment of retirement benefits, particularly since those benefits do not survive the serviceman regardless of his marital status at death."

The Veterans' Administration disability pay which was received in lieu of retirement pay presents a different issue. Disabled servicemen have two options under 10 United States Code section 1401, which governs the computation of retirement pay for all of the armed services. First, retirement pay may be computed solely on the basis of rank and length of service. Under *Fithian,* all of this amount is community property to the extent earned by service during marriage. Second, retirement pay may be computed by multiplying basic pay times the percentage of disability before retirement. *In re Marriage of Stenquist, supra,* 21 Cal.3d 779, held that selection of the "disability" computation does not defeat the community interest in the

amount of retirement pay that would have been due based on rank and length of service. Only the excess of the "disability" pension over the latter amount was held to be separate property.[11]

(3) Mr. Milhan opted to receive a pension administered by the Veterans' Administration. This pension is computed solely on the basis of his disability. (See 38 U.S.C. §§ 314, 334.) In order to receive this benefit, Mr. Milhan waived his right to an equivalent amount of retirement pay. (38 U.S.C. § 3105.) The reasoning of *Stenquist* applies with equal force to this situation and to title 10 disability benefits. However classified for administrative purposes, disability benefits under *Stenquist* are separate property in California only insofar as they exceed the amount of retirement pay waived. Significantly, Mr. Milhan does not appear to contest this proposition. Instead, he contends that under *Hisquierdo* the rule in *Stenquist* violates the supremacy clause of the United States Constitution.

This contention lacks merit. Insofar as disability benefits replace retirement pay waived as a condition of receipt, they perform the same functions as retirement pay. (*Stenquist, supra,* 21 Cal.3d at p. 787.) Since the division of military retirement pay as community property does not violate federal supremacy, it follows that no substantial federal interest is damaged by the division of "disability" benefits which serve identical purposes.

---

[11]The court reasoned that a spouse should not be allowed to defeat the community interest by invoking a condition solely within his or her control. Moreover, the court recognized that as a practical matter only the excess over straight retirement pay is attributable to the disability: " 'It would be unjust to deprive wife of a valuable property right simply because a misleading label has been affixed to husband's pension fund benefits' " (*Stenquist, supra,* 21 Cal.3d at pp. 786-787. Citation omitted.)

Mr. Milhan's attempt to avoid state law by citing the "spendthrift" provision the Veterans' Administration applies to the benefits it administers would substitute a "conflict in words" for the practical clash of interests which the Supreme Court has required for preemption.[12] (*Hisquierdo, supra,* 439 U.S. at p. 581 [59 L.Ed.2d at pp. 10-11].)
(4) Where a practical understanding of state and federal objectives demonstrates that both may be fully achieved, comity precludes the preemption of state law based only on semantic inconsistencies. (Cf. *Merrill, Lynch, Pierce, Fenner & Smith v. Ware* (1973) 414 U.S. 117 [38 L.Ed.2d 348, 94 S.Ct. 383]; *Huron Cement Co. v. Detroit* (1960) 362 U.S. 440 [4 L.Ed.2d 852, 80 S.Ct. 813, 78 A.L.R.2d 1294].)

(5) Next, Mr. Milhan contends that under *Hisquierdo* federal supremacy precludes an award to Mrs. Milhan of property equivalent to her community interest in the military insurance policies. He argues that 38 United States Code section 3101(a) is analogous to the statute in *Hisquierdo* which precluded the assertion of state community property

---

[12] "Payments of benefits due or to become due under any law administered by the Veterans' Administration shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. . . ." (38 U.S.C. § 3101(a)).

Significantly, this provision does not apply to disability benefits distributed as retirement pay under title 10 of the United States Code, since these benefits are not administered by the Veterans' Administration. This limited scope militates against a finding that section 3101(a) manifests a congressional intent to preempt application of state community property claims to all payments classified as "disability" benefits by federal statutes.

claims against railroad pensions.[13] However, section 3101(a) applies only to the "[p]ayments of benefits due" under laws administered by the Veterans' Administration. While this language shields insurance policy proceeds paid to the *named beneficiary*, it does not extend any protection to the *insured* as such. So long as there is no interference with the beneficiary's exclusive enjoyment of the proceeds, section 3101(a) poses no bar to any state claim.

The limited scope of section 3101(a) highlights a more fundamental distinction between *Hisquierdo* and this case. *Hisquierdo* disapproved the award of other property to compensate spouses for their community property interest in rilroad pensions. The court stated this would "impair [railroad pensioners'] economic security just as surely as would a regular deduction from [their] benefit check."[14] (*Hisquierdo, supra*, 439 U.S. at p. 588 [59 L.Ed.2d at p. 15].) However, there is no corresponding federal interest in securing Mr. Milhan's economic stake in the military insurance policies. Rather, the United States Supreme Court has determined that the pertinent federal objective is to secure the policyholder's choice as to who will receive the proceeds of the policies. (*Wissner v. Wissner, supra*, 338 U.S. at pp. 658-659 [94 L.Ed at pp. 428-429].)

This objective was not blunted when Mrs. Milhan was awarded a sum equivalent to her share of the cash surrender value of the insurance policies. Payment of such a sum by

---

[13]*Ante*, page 776.

Mr. Milhan cites former section 454a in 38 United States Code, which has been repealed. 38 United States Code section 310(a) is the analogue to the former section 454a.

[14]The court also relied on the prohibition against "anticipation" of railroad pension benefits which is contained in 45 United States Code section 231m. (*Hisquierdo, supra*, 439 U.S. at pp. 588-589 [59 L.Ed.2d at pp. 14-16].) No such prohibition appears in 38 United States Code Section 3101(a). (*Ante*, p. 771, fn. 6.)

Mr. Milhan would allow him to "retain both policies in force, along with the right to change the beneficiaries thereunder." (*Milhan I, supra,* 13 Cal.3d at p. 133.) Moreover, the beneficiary designated by Mr. Milhan would receive the full benefit of the policy. Under these circumstances, the suggestion that *Hisquierdo* forbade the grant of an offsetting award to Mrs. Milhan ignores the admonition that " 'major damage' " to " 'clear and substantial' " federal interests is necessary before the supremacy clause will override state law. (*Hisquierdo, supra,* 439 U.S. at p. 581 [59 L.Ed.2d at p. 11]. Citation omitted.)

III.

Mr. Milhan asserts three additional errors in the judgment. First, he contends that the trial court abused its discretion in refusing to credit certain payments against the award of back retirement pay. (See *Schubert v. Bates* (1947) 30 Cal.2d 785, 789 [185 P.2d 793].) (6) However, setoff is not ordinarily available where restitution of property awarded under a judgment subsequently reversed is sought by motion, rather than in an independent action. (See *Buckman v. Tucker* (1937) 9 Cal.2d 403, 406 [71 P.2d 69].) Though restitution may be denied where necessary to avoid inequity (see *Schubert v. Bates, supra,* 30 Cal.2d at p. 791; *Palpar, Inc. v. Thayer* (1949) 91 Cal.App.2d 176, 178 [204 P.2d 654]), the record does not show that the trial court abused its discretion in granting restitution in this case.

It was not for the trial court to attempt to compensate Mr. Milhan for an alleged overpayment of taxes on his mistaken assumption that all of his retirement pay was separate property. Nor was Mr. Milhan entitled to reimbursement for the amounts he paid toward the childrens' college expenses, since he testified that he did not expect repayment. Mr. Milhan's modest monthly payments on the annuity he pur-

chased for his surviving children were also gifts, and similarly failed to give rise to any legal debt on the part of Mrs. Milhan.

(7) Next, Mr. Milhan contends that the trial court erred in awarding interest from the date on which this court's remittitur was filed, January 16, 1975, rather than the date on which the present judgment was entered, March 7, 1978. When a judgment is reversed on appeal, a new award subsequently entered by the trial court can bear interest only from the date of the new judgment. (*Snapp v. State Farm Fire & Cas. Co.* (1964) 60 Cal.2d 816, 819 [36 Cal.Rptr. 612, 388 P.2d 884].) However, the remittitur in this case in effect ordered the trial court to enter judgment in Mrs. Milhan's favor on the contested items of property. The filing of this remittitur in accordance with Code of Civil Procedure section 912, fully defined and protected the rights of the parties. (See *Hampton v. Superior Court* (1952) 38 Cal.2d 652, 654 [242 P.2d 1].) The trial court had only to apply equitable principles governing the *enforcement* of these rights. Accordingly, the filing of the remittitur constituted the entry of judgment for purposes of determining the date from which interest may run. (Cf. *Allen v. Paradise Grange No. 490, Inc.* (1959) 176 Cal.App.2d 227 [1 Cal.Rptr. 220].)

(8) Finally, Mr. Milhan contends that the trial court erred in awarding Mrs. Milhan $1,500 attorneys' fees without an adequate showing of need. Civil Code section 4370 authorizes the award of such attorneys' fees "as may be reasonably necessary" to maintain the proceeding. An award pursuant to this section "is within the trial court's discretion, and will be disturbed on appeal only upon a clear showing of abuse." (In re Marriage of Aufmuth (1979) 89 Cal.App.3d 446, 466 [152 Cal.Rptr. 688]; *In re Marriage of Janssen* (1975) 48 Cal.App.3d 425, 428 [121 Cal.Rptr.

701].) The record indicates that Mrs. Milhan had a net monthly income of only $770, while her monthly expenses were $1,119. Exclusively of attorneys' fees, Mrs. Milhan's debts were $60,000. Including half of the community property, from her present marriage, Mrs. Milhan's assets amounted to $21,950. This evidence was sufficient to support the trial court's finding of need. There was no abuse of discretion.

(9) One issue remains. Mrs. Milhan contends that the trial court erred in refusing to order restitution of her share of retirement benefits paid between the 1970 dissolution and the 1972 property division. The contention has merit. The trial court was under a mandatory duty to divide the community property equally. (Civ. Code, § 4800, subd. (a).) Mr. Milhan's stipulation at his wife's request to entry of dissolution in 1970 did not affect the status of the retirement benefits received. (See Civ. Code, § 5110.) Nor did it establish a valid equitable defense to enforcement of her community property rights. Mrs. Milhan is entitled to her share of the 1970-1972 retirement benefits unless on remand Mr. Milhan is able to demonstrate that an equal overall distribution of community property has already been achieved or that restitution would be inequitable. (See *Schubert v. Bates, supra*, 30 Cal.2d at p. 791.)

IV.

Congress has not precluded the application of California community property law to military retirement pay, military insurance policies, or disability pay to the extent received in lieu of retirement.

That part of the judgment which failed to award Mrs. Milhan a community property share in the Veteran's Administration disability pay received by Mr. Milhan in lieu of retirement pay, and failed to divide the retirement pay from

the date of trial in 1970, is reversed. In all other respects, the judgment is affirmed. Mr. Milhan shall assume all costs on appeal.

Tobriner, J., Mosk, J., Clark, J., Richardson, J., Manuel, J., and Newman, J., concurred.

APPENDIX "B."

10 U.S.C. § 6323:

"(a) An officer of the Navy or the Marine Corps who applies for retirement after completing more than 20 years of active service, of which at least 10 years was service as a commissioned officer, may, in the discretion of the President, be retired on the first day of any month designated by the President.

(b) For the purposes of this section—

(1) an officer's years of active service are computed by adding all his active service in the armed forces; and

(2) his years of service as a commissioned officer are computed by adding all his active service in the armed forces under permanent of temporary appointments in grades above warrant officer, W-1.

(c) Unless otherwise entitled to a higher grade, each officer retired under this section shall be retired—

(1) in the highest grade, permanent or temporary, in which he served satisfactorily on active duty as determined by the Secretary of the Navy; or

(2) if the Secretary determines that he did not serve satisfactorily in his highest temporary grade, in the next lower grade in which he has served, but not lower than his permanent grade.

. . .

(e) Unless otherwise entitled to higher pay, an officer retired under this section is entitled to retired pay at the rate of 2½ percent of the basic pay of the grade in which retired multiplied by the number of years of service that may be credited to him under section 1405 of this title, but the retired pay may not be more than 75 percent of the basic

pay upon which the computations of retired pay is based. . . .''

10 U.S.C. § 1431:

(b) To provide an annuity under section 1434 of this title, a person covered by subsection (a) may elect to receive a reduced amount of the retired pay or retainer pay to which he may become entitled as a result of service in his armed force.

10 U.S.C. § 1434:

(a) The annuity that a person is entitled to elect under section 1431 or 1432 of this title shall, in conformance with actuarial tables selected by the Board of Actuaries under section 1436(a) of this title, be the amount specified by the elector at the time of the election, but not more than 50 per centum nor less than 12½ per centum of his retired or retainer pay, in no case less than $25. He may make the annuity payable—

(1) to, or on behalf of, the surviving spouse, ending when the spouse dies or, if the spouse remarries before age 60, when the spouse remarries;

10 U.S.C. § 1447:

(3) ''Widow'' means the surviving wife of a person who, if not married to the person at the time he became eligible for retired or retainer pay—

(A) was married to him for at least one year immediately before his death; or

(B) is the mother of issue by that marriage.

10 U.S.C. § 1440:

No annuity payable under this subchapter is assignable or subject to execution, levy, attachment, garnishment, or other legal process.

10 U.S.C. § 1450:

(b) An annuity payable to the beneficiary terminates effective as of the first day of the month in which eligibility is lost. An annuity for a widow or widower shall be paid to the widow or widower while the widow or widower is living or, if the widow or widower remarries before reaching age 60, until the widow or widower remarries.

10 U.S.C. § 2771:

(a) In the settlement of the accounts of a deceased member of the armed forces who dies after December 31, 1955, an amount due from the armed force of which he was a member shall be paid to the person highest on the following list living on the date of death:

(1) Beneficiary designated by him in writing to receive such an amount, if the designation is received, before the deceased member's death, at the place named in regulations to be prescribed by the Secretary concerned.

(2) Surviving spouse.

10 U.S.C. § 6481:

In time of war or national emergency declared by the President, the Secretary of the Navy may order any retired officer of the Regular Navy or the Regular Marine Corps to active duty at sea or on shore. At any other time the Secretary may order such a retired officer to active duty at sea or on shore only with his consent.

10 U.S.C. § 7601:

(a) Such stores as the Secretary of the Navy designates may be procured and sold to members of the naval service, members of the Coast Guard, and widows of such members.

31 U.S.C. § 203:

All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may

be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, except as hereinafter provided, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.

37 U.S.C. § 701:

(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, a commissioned officer of the Army or the Air Force may transfer or assign his pay account, when due and payable.

(c) An enlisted member of the Army or the Air Force may not assign his pay, and if he does so, the assignment is void.

37 U.S.C. § 705:

Each assignment of pay due an enlisted member of the Navy or Marine Corps and each power of attorney or other authority to draw, receipt for, or transfer that pay, is void, unless attested by the member's commanding officer and the disbursing officer having custody of the member's pay record. An assignment of pay shall state the date when the transfer of pay to the assignee is to begin.

37 U.S.C. § 801:

(c) Payment may not be made from any appropriation, for a period of three years after his name is placed on that list, to an officer on a retired list of the Regular Army, the Regular Navy, the Regular Air Force the Regular Marine Corps, the Regular Coast Guard, the Environmental Science Services Administration, or the Public Health Service, who is engaged for himself or others in selling, or contracting

or negotiating to sell, supplies or war materials to an agency of the Department of Defense, the Coast Guard, the Environmental Science Services Administration, or the Public Health Service.

38 U.S.C. § 3105:

Any person who is receiving pay pursuant to any provision of law providing retired or retirement pay to persons in the Armed Forces, or as a commissioned officer of the National Oceanic and Atmospheric Administration or of the Public Health Service, and who would be eligible to receive pension or compensation under the laws administered by the Veterans' Administration if he were not receiving such retired or retirement pay, shall be entitled to receive such pension or compensation upon the filing by such person with the department by which such retired or retirement pay is paid of a waiver of so much of his retired or retirement pay as is equal in amount to such pension or compensation.

5 U.S.C. § 8345:

(j)(1) Payments under this subchapter which would otherwise be made to an employee, Member, or annuitant based upon his service shall be paid (in whole or in part) by the Office to another person if and to the extent expressly provided for in the terms of any court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation. Any payment under this paragraph to a person bars recovery by any other person.

Cal. Civ. Code § 5105:

The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests. This section shall

be construed as defining the respective interests and rights of husband and wife in community property.

Cal. Civ. Code § 5107:

All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property.

Cal. Civ. Code § 5108:

All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property. The husband may, without the consent of his wife, convey his separate property.

Cal. Civ. Code § 5125:

(b) A spouse may not make a gift of community personal property, or dispose of community personal property without valuable consideration, without the written consent of the other spouse.

United States Constitution, Article VI, Clause 2.

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States shall be the Supreme law of the land; and the Judges in every State shall be bound thereby, anything on the Constitution or the laws of any State to the contrary notwithstanding."

Supreme Court, U.S.
FILED
OCT 20 1980
MICHAEL RODAK, JR., CLERK

No. 80-578

IN THE

Supreme Court of the United States

October Term 1980

HARRY LLOYD MILHAN,

Petitioner,

vs.

MARY LEE MILHAN,

Respondent.

ADDITIONAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

GARY R. RICKS,
J. TERRY SCHWARTZ,
200 East Carrillo Street,
P.O. Box B-B,
Santa Barbara, Calif. 93102,
(805) 962-0011,
Attorneys for Petitioner.

Of Counsel:
PRICE, POSTEL & PARMA

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

APPENDIX.

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

Mary Lee Milhan, Petitioner, Respondent and Cross-Appellant, v. Harry Lloyd Milhan, Respondent, Appellant and Cross-Respondent. 2 Civil No. 55276. (Super.Ct.No. 84183).

Filed: Sept. 10, 1979.

APPEAL from judgment of the Superior Court of Santa Barbara County. Hon. Arden T. Jensen, Judge. Reversed.

Messrs. Price, Postel & Parma, Gary R. Ricks, J. Terry Schwartz, for Appellant.

Messrs. Cavalletto, Webster, Mullen & McCaughey, Jeffrey C. Nelson, for Respondent.

Husband appeals a trial court judgment ordering a community division of his Navy retirement pay and of the cash surrender value of two military life insurance policies. The judgment was entered pursuant to a decision and remittitur of the California Supreme Court, which had reversed the trial court's earlier adjudication that these assets were husband's separate property. (*In re Marriage of Milhan* (1974) 13 Cal.3d 129, cert. den. (1975) 421 U.S. 976.) Wife cross-appeals the judgment on the ground that husband's Veterans Administration disability benefits should also have been classified and divided as community property.

The parties were married in 1944, following husband's graduation from the United States Naval Academy. In November 1965 husband retired from the Navy (10 U.S.C., § 6323), and thereafter the parties took up residence in California. Wife commenced divorce proceedings in 1968. In February 1970 the trial court dissolved the marriage, but

reserved jurisdiction to divide the parties' community property at a later time. Each party remarried and entered upon gainful employment. In May 1972 the trial court entered a judgment dividing the community property, which determined that husband's Navy retirement pay and the two military life insurance policies — a National Service Life Insurance policy administered by the Veterans Administration, and a Navy Mutual Aid Association policy administered by the Navy — were husband's separate property. Wife appealed.

In December 1974 the judgment of the trial court was reversed by the California Supreme Court, which declared that wife was entitled to half the Navy retirement pay and also entitled to an offsetting award from other community property for half the value of the military insurance policies. (*In re Marriage of Milhan, supra*, 13 Cal.3d at p. 131, citing *In re Marriage of Fithian* (1974) 10 Cal.3d 592.) In its remittitur the California Supreme Court ordered the trial court to enter judgment consistent with the Supreme Court's opinion.

In February 1976 wife filed a motion in the trial court for entry of judgment in accordance with the decision and remittitur of the California Supreme Court and for restitution of half the retirement pay already received by husband, with interest and attorney's fees. In the trial court's judgment of March 1978, from which this appeal is taken, the court awarded wife half the husband's Navy retirement pay, half the retirement pay received by husband between May 1972 and March 1978, interest on back retirement pay, offsetting community property equal to half the cash value of the military insurance policies, and attorney's fees. Husband's Veterans Administration disability benefits were treated as separate property and not included in the division of community property.

On appeal, wife contends as a preliminary matter that the judgment of March 1978 is not subject to review. We disagree. The judgment of a trial court entered under the direction of a higher court is appealable (*Gore v. Bingaman* (1942) 20 Cal.2d 118); and the doctrine of "the law of the case," which precludes a second appellate determination of legal issues resolved in a prior appeal, does not apply when, as here, intervening judicial and congressional action has clarified contested legal issues. (See *Subsequent Injuries Fund v. Ind. Acc. Com.* (1960) 53 Cal.2d 392, 395; *Standard Oil v. Johnson* (1942) 56 Cal.App.2d 411, 415-416.) We therefore turn to the merits.

1. *Navy Retirement Pay.* In 1974 when the California Supreme Court rendered its decision in the cause at bench, the leading case on community property status of military retirement pay was *In re Marriage of Fithian* (1974) 10 Cal.3d 592. Fithian, a former Marine, claimed the federal Supremacy Clause (U.S. Const., art. VI, cl. 2) protected his retirement pay from the operation of California's community property laws. But the California Supreme Court found a lack of intent by Congress to preclude community division of military retirement benefits. It rejected Fithian's contention that community division of his retirement benefits would constitute an impermissible attachment, and it concluded that military retirement pay was a community asset divisible between the spouses on dissolution of the marriage to the extent earned during the marriage.

More recently, however, the United States Supreme Court in January of this year reversed a California Supreme Court decision which had applied California's community property laws to retirement benefits payable under the Railroad Retirement Act (45 U.S.C., §§ 231 et seq.). The United States Supreme Court, in ruling that no community interest attached to an employee's benefits payable under the Act,

found federal preemption in the allocation of a federal entitlement, rejected the distinction drawn by the California Supreme Court between a garnishing creditor and a "present owner" spouse, and concluded that a community award to the nonemployee spouse of half her husband's retirement benefits impermissibly interfered with the congressional intent expressed in the Act's anti-attachment provision (45 U.S.C., § 231m) to ensure that the employee spouse would be the sole recipient of employee benefits. The court noted that while Congress had amended the Social Security Act in 1975 to allow garnishment of otherwise nonattachable federal benefits to collect child support and alimony (42 U.S.C., § 659), in a further amendment in 1977 it specifically excluded division of community property from its definition of alimony (42 U.S.C., § 662(c)). The court's opinion specifically rejected the theory that federal allocation of benefits could be circumvented by an award to the nonemployee spouse of other community property to offset the loss of community interest in the federally-protected asset. (*Hisquierdo v. Hisquierdo* (1979) .... U.S. .... , 59 L.Ed.2d 1, 8, 12-14.)

Hisquierdo is directly relevant to the issue here — whether a married naval officer's retirement pay becomes quasi-community property when the couple takes up residence in California — in that under the doctrine of federal sovereign immunity, military retirement pay is, and always has been, nonattachable. (*Buchanan v. Alexander* (1846) 45 U.S. 20; *Applegate v. Applegate* (1941) 39 F.Supp. 887; *Arnold v. United States* (1971) 331 F.Supp. 42.) In *Buchanan v. Alexander, supra,* the United States Supreme Court, in holding that a creditor could not attach or garnish a Navy seaman's wages in a state court, pointed out that "the funds of the government are specifically appropriated to certain national objects," and state process which "di-

verted or defeated'' such appropriations must defer to federal allocation.

As in the instance of railroad retirement benefits, recent amendments to the Social Security Act indicate congressional intent to protect military retirement pay from the operation of state community property laws. The 1975 amendment (45 U.S.C., § 659) permits attachment of a serviceman's retirement benefits to enforce alimony and child support obligations, but the 1977 amendment makes it clear that this provision does not apply to community property obligations. That statute declares that alimony

> ''. . . does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.'' (42 U.S.C., § 662(c).)

Congress could have recognized a spouse's community property interest in service retirement benefits had it chosen to do so. In *Hisquierdo, supra,* the United States Supreme Court noted that in 1978 Congress enacted special legislation to permit garnishment of a civil servant's retirement benefits for community property purposes (*Hisquierdo, supra,* 59 L.Ed.2d at p. 16, 5 U.S.C., § 8345(J); see also *In re Marriage of Orr* (1979) 95 Cal.App.3d 561). But Congress has enacted no comparable provision allowing garnishment of a former serviceman's retirement pay for community property purposes, perhaps in recognition of the disruptive effect varying state laws might have upon a mobile service population.

We conclude that in the light of the recent cases and statutes discussed above, military retirement pay remains the separate property of the former serviceman to whom it is payable.

2. *Military Insurance Policies.* In 1950 the United States Supreme Court in *Wissner v. Wissner*, 338 U.S. 655, held that an order requiring the beneficiary of a National Service Life Insurance policy (38 U.S.C., §§ 701 et seq.) to pay half the proceeds of the policy to a deceased serviceman's spouse as community property was invalid under the Supremacy Clause because it impermissibly interfered with Congress' intent to assure that the serviceman alone has the right to choose the beneficiary of his policy (formerly 38 U.S.C., § 802(g), now 38 U.S.C., § 717(a)). In 1974 the California Supreme Court interpreted the *Wissner* decision as precluding only those applications of the state's community property laws that would frustrate express congressional intent (such as requiring the insured to surrender the policy and pay half the proceeds to his spouse), and as permitting the state to otherwise apply its community property laws to achieve an equitable division of the spouses' property on dissolution of marriage. (*In re Marriage of Fithian, supra,* 10 Cal.3d at pp. 597-598.) The California Supreme Court adhered to this interpretation when the present cause came before it in 1974 (*In re Marriage of Milhan, supra,* 13 Cal.3d 129), and it ruled that a serviceman's spouse could be compensated for the loss of her community interest in military insurance policies by an offsetting award of other property. But in 1979 the United States Supreme Court in *Hisquierdo v. Hisquierdo, supra,* 59 L.Ed. 1, 14-16, specifically disapproved the ruling of the California Supreme Court in the instant cause and specifically rejected the doctrine of remedial offset. An offsetting award under the *Milhan* doctrine, said the court, "would upset the statutory balance and impair [the retired spouse's] economic security just as surely as would a regular deduction from his benefit check." (*Hisquierdo*, p. 15.) A trial court's award of half the cash value of military insur-

ance policies to a spouse would effectively nullify the beneficiary election specifically given the insured serviceman by Congress and would frustrate congressional intent to assure members and veterans of the armed services a uniform and inexpensive form of life insurance. (*Wissner v. Wissner, supra,* pp. 658-659.)

3. *Veterans Administration Disability Benefits.* On cross-appeal, wife contends the trial court erred in failing to classify and divide husband's Veterans Administration disability benefits as community property. We recently addressed this issue *In re Marriage of Orr, supra,* 95 Cal. App.3d 561, and held that Congress intended such benefits to remain the separate property of the disabled spouse (38 U.S.C., § 3101). Accordingly, we find no error in the court's failure to include disability benefits in the division of community property.

4. *Attorney's Fees.* Finally, husband contends the trial court's award to wife of $1,500 in attorney's fees was improper. (Civ. Code, § 4370.) Since our decision upholds the husband's contentions in full, we agree that the trial court's award of attorney's fees to the wife was erroneous.

The judgment is reversed. Costs on appeal to appellant-husband.

CERTIFIED FOR PUBLICATION.

/s/ FLEMING, *ACTING P.J.*
Fleming

We concur:

/s/ COMPTON, *J.*
Compton

/s/ BEACH, *J.*
Beach

Supreme Court, U. S.
FILED
NOV 28 1980
MICHAEL RODAK, JR., CLERK

No. 80-578
IN THE

Supreme Court of the United States

October Term 1980

HARRY LLOYD MILHAN,

Appellant,

vs.

MARY LEE MILHAN,

Appellee.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

RESPONDENT'S BRIEF IN OPPOSITION.

JEFFREY C. NELSON,
112 East Victoria Street,
Santa Barbara, Calif. 93101,
(805) 966-1501,
Counsel for Respondent.

Of Counsel:
CAVALLETTO, WEBSTER, MULLEN,
& MCCAUGHEY

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

TABLE OF CONTENTS

	Page
Opinion Below	1
Statement of the Case	2
Reasons Why the Writ Should Be Denied	4
1. This Court Has Previously Denied Certiorari to the Petitioner on a Judgment Deciding Two of the Three Same Questions Presented in This Petition. The Prior Judgment Was Final and Was Res Judicata on Those Issues	4
2. The Decision Is Correct	7
3. The Issues Presented by This Case Are Distinguishable From Those Before the Court in McCarty v. McCarty, No. 80-5, and This Case Should Not Be Governed by Any Decision in That Case	10
Conclusion	13
Exhibit A. Judgment of the Superior Court of the State of California, County of Santa Barbara	1
Exhibit B. Findings of Fact and Conclusions of Law	5

TABLE OF AUTHORITIES

Cases	Page
Addison v. Addison (1965) 62 Cal.2d 558, 399 P.2d 897	12
Allen v. Allen (Tex. Civ. App. 1962) 363 S.W.2d 312	9
Busby v. Busby (Texas 1970) 457 S.W.2d 551	10
Cearley v. Cearley (Texas 1976) 544 S.W.2d 661	10
Cohen, In re Marriage of (1980) 105 Cal.App.3d 836	8
Czarnecki v. Czarnecki (1979) 123 Ariz. 466, 600 P.2d 1098	10
Eichelberger v. Eichelberger (Texas S.Ct. 1979) 582 S.W.2d 395	9
Fithian, In re Marriage of (1974) 10 Cal.3d 592, cert. denied 419 U.S. 825, rehear. denied 419 U.S. 1060	10
Heuchan v. Heuchan (1951) 228 P.2d 470	9
Hillerman, In re Marriage of (1980) 109 Cal.App.3d 334	8
Hisquierdo v. Hisquierdo (1979) 439 U.S. 572	2, 7, 8, 9, 10, 13
Johnson, Ex Parte (Texas 1979) 591 S.W 2d 453	10
McCarty v. McCarty, No. 80-5 (U.S. S.Ct. Nov. 10, 1980)	10, 11, 12
Milhan, In re Marriage of (1974) 13 Cal.3d 129, 528 P.2d 1145, cert. denied 421 U.S. 976	2, 4, 10
Milhan, In re Marriage of (1975) 421 U.S. 976	2
Milhan, In re Marriage of (1980) 27 Cal.3d 779	4, 5, 7, 10
Moon v. Moon (Ct. App. 1977) 345 So.2d 168	10

Page

Morris v. Morris (Wash. S.Ct. 1975) 419 P.2d 129 ... 10
Perez v. Perez (Texas 1979) 587 S.W.2d 671 10
Ramsey v. Ramsey (Idaho S.Ct. 1975) 535 P.2d 53 .. 10
Rio Grande Western Railway Co. v. Stringham (1915) 239 U.S. 44 6
Stephens v. Stephens (S.Ct. 1979) 595 P.2d 1196 10
Subsequent Injuries Fund v. Ind. Acc. Com. (1960) 53 Cal.2d 392, 348 P.2d 193 5
United States v. Yazell (1966) 382 U.S. 341 8
Wodlicka v. Wodlicka (1976) 17 Cal.3d 181 5

Statutes

California Civil Code, Sec. 4803 ..... 10, 11
California Civil Code, Sec. 5105 11
United States Code, Title 28, Sec. 1257(2) 10
United States Code, Title 37, Sec. 701 ..... 11, 12
United States Code, Title 37, Sec. 702 12
United States Code, Title 45, Sec. 231d(c)(3) 7
United States Code, Title 45, Sec. 231m 7, 11

No. 80-578
IN THE

Supreme Court of the United States

October Term 1980

HARRY LLOYD MILHAN,

Appellant,

vs.

MARY LEE MILHAN,

Appellee.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

RESPONDENT'S BRIEF IN OPPOSITION.

The respondent, the former Mary Lee Milhan, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the California Supreme Court's opinion in this case. That opinion is reported at 27 Cal.3d 765.

Opinion Below.

Attached as Exhibit "A" is the California Superior Court decision which was subject to review in the California Supreme Court opinion. Attached as Exhibit "B" are the Findings of Fact and Conclusions of Law issued in connection with that judgment.

Statement of the Case.

In this case, petitioner Harry Lloyd Milhan ("husband") petitions for writ of certiorari following the second of two California Supreme Court opinions and judgments in this case.

The first opinion reversed a trial court judgment and in doing so, held that husband's Navy retired pay was divisible under California community property laws and that an offsetting award of other community property could be made for the cash value of certain military life insurance policies. *In re Marriage of Milhan,* 13 Cal.3d 129, 528 P.2d 1145 (1974). Following the entry of judgment caused by the filing of the California Supreme Court's remittitur to the trial court, husband petitioned for certiorari.

Certiorari was denied by this Court following that first judgment. (*In re Marriage of Milhan,* 421 U.S. 976 (1975).)

During the pendency of subsequent proceedings before the trial court for restitution of back amounts of retired pay and related matters, husband became entitled to disability pay in lieu of a corresponding amount of retired pay. Husband raised the issue of disposition of his disability pay at that time. After the trial court entered its judgment and while that judgment was on appeal, this Court issued its decision in *Hisquierdo v. Hisquierdo,* which prompted husband to raise the issue of federal preemption.

The California Supreme Court carefully analyzed and rejected husband's preemption arguments in its opinion reported at 27 Cal.3d 765.

Husband and wife were married during the entire 20 years of husband's military service. During many of those years they resided in California. After husband retired from the military, he and wife moved to California and established

permanent residence and domicile. The parties' marriage was dissolved five years after Mr. Milhan retired from the Navy and began receiving military retired pay.

REASONS WHY THE WRIT SHOULD BE DENIED.

1. This Court Has Previously Denied Certiorari to the Petitioner on a Judgment Deciding Two of the Three Same Questions Presented in This Petition. The Prior Judgment Was Final and Was Res Judicata on Those Issues.

Two of the three issues involved in the petition were decided in a prior final judgment in the proceedings between the parties. In the 1972 trial court judgment, Petitioner Harry Lloyd Milhan (the husband) was awarded as separate property his retirement pension and two military insurance policies which had been purchased with community funds. The California Supreme Court reversed that judgment in *In re Marriage of Milhan*, 13 Cal.3d 129, 528 P.2d 1145 (1974). On January 16, 1975, the Supreme Court's remittitur was filed with the Superior Court. It is submitted that that judgment created by the filing of the remittitur was a final judgment as to those issues. In fact, the California Supreme Court in the opinion from which husband has petitioned, states:

> "[T]he remittitur in this case [following the first Supreme Court Decision] in effect ordered the trial court to enter judgment in Mrs. Milhan's favor on the contested items of property. The filing of this remittitur, in accordance with Code of Civil Procedure section 912, fully defined and protected the rights of the parties. (Citation omitted.) The trial court had only to apply equitable principles governing the *enforcement* of these rights. Accordingly, the filing of the remittitur constituted the entry of judgment for purposes of determining the date from which interest may run. (Citations omitted.)" (*In re Marriage of Milhan*, 27 Cal.3d 779. Petition Appendix "A", p. 14.)

Consequently, the Court's first judgment was final on the issues of the property disposition of the Navy retired pay and the disposition of husband's military insurance policies and was res judicata.[1]

Husband petitioned to this Court for certiorari from that first judgment and stated that he was petitioning to "review the final judgment of the Superior Court of the State of California entered on January 16, 1975, pursuant to a decision and order of the Supreme Court of the State of California." (Petition for Writ of Certiorari, by Harry Lloyd Milhan dated March 17, 1975, no. 74-1177.)

Wife respectfully requests that the Court take judicial notice of this record of the U.S. Supreme Court.

The judgment addressed by the California Supreme Court in its second decision was a formal judgment incorporating the terms of the first judgment which was created by the filing of the remittitur and also dealt with subordinated issues regarding enforcement.[2] The issue of the divisibility of hus-

---

[1]Under California Law,

" 'The doctrine of res judicata precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction. Any issue necessarily decided in such litigation is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action.' (*Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 810 [122 P.2d 892].) The same rule applies to final adjudications rendered in the course of a divorce proceeding over which a court may have continuing jurisdiction and which may require several orders for its ultimate disposition." (*Wodicka v. Wodicka* (1976) 17 Cal.3d 181, 188.)

[2]The California Supreme Court opinion states in a footnote:

> "Mrs. Milhan's contention that the decision in Milhan I is the final law of the case is incorrect inasmuch as *Hisquierdo* was decided while the appeal herein was pending. (See *Subsequent Injuries Fund v. Ind. Acc. Com* (1960) 53 Cal.2d 392, 395 [348 P.2d 193].)" (*In re Marriage of Milhan*, 27 Cal.3d at p. 771, fn. 4.)

However, the opinion, after much analysis, determines that there has in fact been no change in law which would affect the prior judgment. Consequently, the case cited, *Subsequent Injuries Fund*, is inapplicable. That case held that an exception to the doctrine of law of the case arises when there has been a change in law since the former appellate decision, which change would result in defeating a just cause if law of the case were strictly followed.

band's disability pay which he had converted from retired pay was first addressed by the trial court after the filing of the remittitur and before it entered its formal judgment. That issue alone was not res judicata from the prior judgment.

Consistent with that effect, husband did not argue in the trial court that federal law preempted the disposition of the retired pay and disposition of the insurance policies. He did argue that the disability pay was husband's separate property.

The only way one could conclude that the 1975 judgment was final for the purpose of Supreme Court review and that the 1980 judgment was likewise final would be to view the first judgment as being final as to the two issues it addressed and the recent judgment as being final as to the new issue only, the disposition of husband's disability pay.

In *Rio Grande Western Railway Co. v. Stringham* (1915) 239 U.S. 44, the Supreme Court held that only the first of two judgments could be reviewed by the U.S. Supreme Court. Like this case, that case involved two judgments; the first judgment directed the lower court to enter a certain judgment and the second judgment resulted from that action. The Court reasoned that the first judgment disposed of the case on the merits. In directing that judgment should be entered, it left nothing to the judicial discretion of the trial court. Consequently, the writ of error addressed to the second judgment presented nothing reviewable for the U.S. Supreme Court.

Similarly, in this case the first judgment entered following the first Supreme Court decision directed entry of judgment and "fully defined and protected the rights of the parties."

(*In re Marriage of Milhan*, 27 Cal.3d at p. 779.) The second judgment should not be subject to review.[3]

2. The Decision Is Correct.

In this case, the California Supreme Court has carefully analyzed the treatment under its community property system of Navy retired pay, disability pay received in lieu of retirement pay, and military life insurance policies in light of the statutes governing those benefits and this Court's decision in *Hisquierdo v. Hisquierdo* (1979) 439 U.S. 572.

The principal economic asset involved in this case is Navy retired pay. As the opinion ably states, neither of the statutory provisions found to be indicative of federal preemption in *Hisquierdo* exists for Navy retired pay. As to the first of these two elements, no federal statute protects Navy retired pay from attachment, garnishment, assignment and other legal process as protects railroad retirement benefits. (45 U.S.C., §231m.)

As to the second of these, the statutes governing Navy retired pay do not create a separate benefit for the nonmilitary spouse that is terminated on dissolution of marriage as exists for railroad retirement benefits. (45 U.S.C., §231d(c)(3).) Navy retired pay does not have this combi-

---

[3]In husband's statement of the case, he makes reference to objections being raised throughout the trial court proceeding, but does not state that he continued to argue that the disposition of the Navy retired pay and federal insurance policies was precluded by federal law. Consequently, wife was never required to argue collateral estoppel in that proceeding because the basic issues decided in the prior judgment were not in dispute. Wife did maintain throughout that the entry of the remittitur constituted entry of the judgment. Only when the judgment was on appeal and the U.S. Supreme Court had issued its *Hisquierdo* decision did husband raise federal preemption arguments which had lain dormant since the final judgment in 1975. When this issue was raised in the Court of Appeal, wife strenuously objected that husband was attempting an impermissible collateral attack on the first judgment of January 16, 1975.

nation of statutory elements found so critical in *Hisquierdo;* in fact, it has neither of them.

The statutory provisions husband cites are those dealing with elective annuity plans which are distinct from the benefits in question here and which do not, in any case, create a spousal benefit designed to reflect the contribution of military spouses to the marital community.

As is evident from the California Supreme Court's opinion, the statutes creating and defining Navy retired pay contain no provision which indicates an intent of Congress to prevent community property states from including that property in the fabric of its community property system. In fact, to remove it from the community property system would do substantial harm to it. (See *United States v. Yazell,* 382 U.S. 341 (1966).)

In the absence of any statutory provisions evidencing a federal intent to preempt on Navy retired pay, it cannot be maintained here that "Congress has 'positively required by direct enactment' that state law be preempted." (*Hisquierdo, supra,* 439 U.S. at 581 (citation omitted).)

California has adhered to the *Hisquierdo* decision. It has recently held social security benefits to be nondivisible.[4]

The decision in this case is also fair and consistent with California's community property system under which all community assets and debts are divided equally upon dissolution of marriage. Since military retired pay is often the principal asset when parties' marriage is dissolved, a contrary decision could leave husband with the entire value of

---

[4]*In re Marriage of Hillerman,* 109 Cal.App.3d 334 (1980); *In re Marriage of Cohen,* 105 Cal.App.3d 836 (1980). *Hisquierdo* noted the many parallels between social security and railroad retirement pay including the fact that the larger tier of benefits under the Railroad Retirement Act corresponds exactly to those under Social Security. (439 U.S. at 575.)

that asset, leaving wife with no corresponding asset and possibly leaving wife subject to the continuing obligation for one-half of the parties' debts.[5] Moreover, if the wife was able to accrue rights in a private pension during her marriage, husband would receive half of the wife's pension plus the right to all of his Navy pension.

This Court's decision in *Hisquierdo* was not a departure from a long standing treatment of railroad retirement pay as a community asset in community property jurisdictions prior to that decision. There was no such long standing treatment of that asset in the community property jurisdictions.[6]

Unlike railroad retirement pay, military retired pay has received uniform treatment as a community asset in community property states. There is no conflict of authorities on this issue among the community property states. Every community property state that has addressed the issue has held military retired pay to be community property divisible

---

[5]The inequity is aggravated in a community property jurisdiction such as Texas where alimony is prohibited as being against public policy. (*Eichelberger v. Eichelberger*, 582 S.W.2d 395 (Texas S.Ct. 1979) (denying wife alimony and granting husband Railroad Retirement benefits).)

[6]Texas: *Allen v. Allen*, 363 S.W.2d 312, 314 (Tex. Civ. App. 1962) (railroad pension held nondivisible) cf. *Eichelberger v. Eichelberger*, 582 S.W.2d 395 (Texas S.Ct. 1979) (post *Hisquierdo*) (held nondivisible, reversing contrary pre-*Hisquierdo* Court of Appeal decision).

Washington: *Heuchan v. Heuchan*, 228 P.2d 470 (1951) (support collection action indicates railroad retirement had not been divided on divorce).

upon dissolution of marriage.[7] Countless judgments have been entered on this basis. One cannot minimize the profound disruption a contrary ruling would cause for these states' community property systems.

3. The Issues Presented by This Case Are Distinguishable From Those Before the Court in McCarty v. McCarty, No. 80-5, and This Case Should Not Be Governed by Any Decision in That Case.

This case differs from *McCarty v. McCarty* in both the questions presented and the applicable law. *McCarty v. McCarty*, No. 80-5,[8] is a case in which the constitutionality of the California code section governing the division of quasi-community property is challenged. (Calif. Civ. Code, §4803.) The trial court judgment in this case characterizes husband's Navy retired pay as the parties' community prop-

---

[7] *e.g.*, California: *In re Marriage of Milhan*, 27 Cal.3d 765 (1980); *In re Marriage of Milhan*, 13 Cal.3d 129 (1974), cert. denied 421 U.S. 976; *In re Marriage of Fithian*, 10 Cal.3d 592 (1974), cert. denied 419 U.S. 825, rehearing denied 419 U.S. 1060; Idaho: *Ramsey v. Ramsey*, 535 P.2d 53 (Idaho S.Ct. 1975); Louisiana: *Moon v. Moon*, 345 So.2d 168 (Ct. App. 1977); Washington: *Morris v. Morris*, 419 P.2d 129 (Wash. S.Ct. 1975); Arizona: *Czarnecki v. Czarnecki*, 123 Ariz. 466, 600 P.2d 1098 (1979) (post *Hisquierdo*); New Mexico: *Stephens v. Stephens*, 595 P.2d 1196 (S.Ct. 1979); Texas: *Busby v. Busby*, 457 S.W.2d 551 (Texas 1970); *Cearley v. Cearley*, 544 S.W.2d 661 (Texas 1976); *cf. Ex Parte Johnson*, 591 S.W.2d 453 (Texas 1979) (disability pay from Veterans Administration held nondivisible; husband not entitled to longevity retirement); *Perez v. Perez*, 587 S.W.2d 671 (Texas 1979) (military readjustment benefits held nondivisible, distinguished from military retired pay); Nevada apparently has not addressed the issue.

[8] Probable jurisdiction of appeal under 28 U.S.C. §1257(2) reportedly noted by U.S. Supreme Court on November 10, 1980.

erty.[9] Husband did not object to or contest that characterization. Likewise, the question presented in husband's petition for certiorari is "whether federal military retired pay is community property subject to division with a non-military ex-spouse upon dissolution of marriage."

This case poses the question whether Navy retired pay may be divided as community Property, not whether California's quasi-community property statute can be applied where the military spouse is on active duty and denies California domicile.

The husband in *McCarty* argues that the anti-assignment and anti-anticipation provision in 37 U.S.C. §701 is the statutory parallel to the Railroad Retirement Act's anti-assignment provision (45 U.S.C. §231m). That statute (§701) clearly relates only to the assignment of pay of the members of the Army and Air Force. In stark contrast to that section is 37 U.S.C. §702,[10] which specifically permits Navy officers to make allotments of their pay without restricting the recipients or purposes.

In short, any inference that 37 U.S.C. §701 indicates a Congressional intent to shield Army pay from assignments

---

[9]California Civil Code section 5105 states that:

> "The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests. This section shall be construed as defining the respective interests and rights of husband and wife in community property."

Under Civil Code section 4803, quasi-community property is property acquired by either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in California at the time of its acquisition.

[10]"The Secretary of the Navy, under regulations prescribed by him, may permit an officer of the Navy or Marine Corps to make allotments of his pay —

(1) For the support of his family relatives;
(2) For his own savings; or
(3) For other purposes."

is specifically negated for Navy pay as section 702 specifically authorizes making pay allotment for unrestricted purposes.

McCarty deals with division of Army retired pay which was not vested at the time of divorce and which involved an active military member who disputed his California domicile. The facts in this case are distinctly different; it involves a husband and wife whose marriage was dissolved five years after the husband had retired from the Navy and had started receiving his Navy retired pay. California's jurisdiction over the parties was unquestioned as both husband and wife had resided in and been domiciled in California before a petition was filed for the dissolution of their marriage.

Any arguments made in *McCarty* about the necessity for uniform state law disposition of military assets because of the mobility of the service population are completely irrelevant in this case. It would be specious to contend that after the husband left the Navy the non-military spouse (the wife in this case) could or did somehow force the ex-military spouse (husband) to move to a state with favorable marital property laws in case they became divorced.

In a case like *McCarty*, the military spouse has the ability to keep his domicile in the state of his choice, thereby affecting the jurisdiction of the state in which the couple resides. Under California law, both parties must be domiciled in California for it to divide their quasi-community property. *Addison v. Addison* (1965) 62 Cal.2d 558, 399 P.2d 897. Consequently, for military personnel who keep their domicile elsewhere there is not a serious threat of California exercising its jurisdiction over those parties who are in the state "involuntarily." It should be noted that the wife of a military employee generally does not have the same ability to declare a different domicile as the husband has and consequently, if anyone is adversely affected by the

jurisdictional aspects of the transience of military life, it is the non-military wife, not the husband.

The California Supreme Court's opinion in this case is scrupulously attentive to the guidance this Court has given in *Hisquierdo* in analyzing the issue of federal preemption. It is also consistent with a long line of cases in community property jurisdictions dividing military retired pay which this Court has permitted to stand. So, too, does this case deserve to stand.

Conclusion.

For the reasons articulated above, the petition for writ of certiorari should be denied.

November 25, 1980.

Respectfully submitted,

JEFFREY C. NELSON,
Counsel for Respondent,
the former Mary Lee Milhan.

Of Counsel:

CAVALLETTO, WEBSTER, MULLEN
& MCCAUGHEY.

EXHIBIT A.

Judgment.

Superior Court of the State of California for the County of Santa Barbara.

In re the Marriage of Petitioner, Mary Lee Milhan and Respondent, Harry Lloyd Milhan. No. 84183.

Filed March 7, 1978.

In this proceeding the court, pursuant to stipulation of the parties, entered its Interlocutory Judgment of Dissolution of Marriage on February 2, 1970, and its Final Judgment of Dissolution of Marriage on February 17, 1970. In both the Interlocutory and Final Judgments the court reserved jurisdiction to make its order with respect to division of community property and other matters.

On May 2, 1972, the court entered its Judgment Dividing Community Property and Determining Separate Property, and determined that the subject life insurance policies and Navy retired pay were Respondent's separate property. Petitioner appealed that portion of the Judgment concerning the character of those items of property.

A Remittitur was filed with the clerk of this court on January 16, 1975, after the decision of the Supreme Court of the State of California became final. Such Remittitur reversed the trial court Judgment of May 2, 1972, and directed this court to enter judgment in accordance with the Supreme Court opinion.

The above entitled action came on for hearing pursuant to Petitioner's Notice of Motions filed herein on February 20, 1976, wherein Petitioner seeks the following: entry of judgment in accordance with the Order, Judgment and Remittitur of the Supreme Court of California, restitution of pension monies received by Respondent since this court's former judgments and to which the Supreme Court held

Petitioner had a community property interest; interest on such sums; and attorneys' fees. Respondent filed a counter motion on March 5, 1976, seeking to modify child support for the minor daughter of the parties, MARGARET LISA MILHAN, born February 14, 1962. The issues raised by the foregoing motions were orally argued before the court on March 17, 1976, and April 1, 1976, the Honorable Arden T. Jensen, Judge, presiding. Thereafter both parties submitted further written argument and authorities and the matter was submitted for the court's decision.

The court issued its Memorandum of Intended Decision on March 15, 1977. The Memorandum of Intended Decision was orally argued before the court on April 11, 1977.

Petitioner MARY LEE PASLEY (MILHAN) has appeared by her counsel, Jeffrey C. Nelson of Cavalletto, Webster, Mullen & McCaughey. Respondent HARRY LLOYD MILHAN has appeared by his counsel, Gary R. Ricks of Price, Postel & Parma.

Upon appropriate proof being made to the satisfaction of the court and good cause appearing therefor:

IT IS ORDERED AND ADJUDGED THAT:

1. The Judgment entered herein on May 2, 1972, Reel #31, Judgment #22690, is hereby modified in all respects in which it is inconsistent with this Judgment.

2. Respondent's United States Navy retired pay is the community property of the parties.

3. Petitioner shall have judgment against Respondent for restitution of one-half (½) of the United States Navy retired pay received by Respondent after May 2, 1972, when judgment was entered dividing the community property. The gross amount of retired pay to which Respondent was entitled for the period from May 2, 1972, through February 1976, the month preceding the court's first hearing on the

motions herein, was Thirty-Five Thousand One Hundred Eleven and 31/100 Dollars ($35,111.31), one-half of which is Seventeen Thousand Five Hundred Fifty-Five and 65/100 Dollars ($17,555.65). Said amount shall also draw interest at the rate lawfully permitted on judgments, which interest shall be computed from January 16, 1975.

4. Execution of paragraph 3 of this Judgment shall be stayed so long as Respondent shall make payments in a minimum amount of Two Hundred Dollars ($200.00) per month toward said Judgment, which payments shall commence April 1, 1977, and be paid on the first day of each and every month thereafter for a period of five years. Execution shall order April 1, 1982, if said Judgment has not been paid in full before that date.

5. Respondent shall pay Petitioner one-half (½) of the gross amount of United States Navy retired pay to which he was entitled for the period commencing with March 1976 and ending upon the date of this Judgment. Such sums shall also draw interest at the rate lawfully permitted on judgments.

6. Respondent shall pay to Petitioner one-half (½) of the gross amount of United States Navy retired pay to which he is entitled as he receives payment of such benefits. Petitioner's one-half interest is currently a monthly amount of Four Hundred Thirty-six and 30/100 Dollars ($436.30). ($872.59 ÷ 2 = $436.30)

7. Petitioner shall have judgment against Respondent in the amount of Two Thousand Two Hundred Forty-One and 50/100 Dollars ($2,241.50), representing one-half (½) of the cash surrender value, as of the date of trial, of the National Service Life Insurance policy and the Navy Mutual Aid Association policy. Respondent shall not surrender or otherwise impair those policies in order to satisfy Peti-

tioner's (wife's) entitlement, but shall pay out of the other community property, which has been found to be adequate for such payment. Said amount of Two Thousand Two Hundred Forty-One and 50/100 Dollars ($2,241.50) shall likewise bear interest at the rate provided by law from January 16, 1975.

8. Execution of paragraph 7 of this Judgment shall be stayed so long as Respondent shall pay minimum monthly payments of One Hundred Dollars ($100.00) toward said Judgment, which payments shall commence April 1, 1977, and continue until payment is made in full.

9. Respondent's motion for a reduction in child support is denied.

10. Respondent shall pay to Petitioner the sum of One Thousand Five Hundred Dollars ($1,500.00) as and for attorneys' fees.

11. The court reserves jurisdiction to supervise the payment of retired pay benefits.

12. In all other respects the Judgment of this court dated May 2, 1972, remains unchanged.

Dated: March 7, 1978.

/s/ ARDEN T. JENSEN
Judge of the Superior Court

EXHIBIT B.

Findings of Fact and Conclusions of Law.

Superior Court of the State of California for the County of Santa Barbara.

In re the Marriage of Petitioner, Mary Lee Milhan and Respondent, Harry Lloyd Milhan. No. 84183.

Filed March 7, 1978.

In this proceeding the court, pursuant to stipulation of the parties, entered its Interlocutory Judgment of Dissolution of Marriage on February 2, 1970, and its Final Judgment of Dissolution of Marriage on February 17, 1970. In both the Interlocutory and Final Judgments the court reserved jurisdiction to make its order with respect to division of community property and other matters.

On May 2, 1972, the court entered its Judgment Dividing Community Property and Determining Separate Property, and determined that the subject life insurance policies and Navy retired pay were Respondent's separate property. Petitioner appealed that portion of the Judgment concerning the character of those items of property.

A Remittitur was filed with the clerk of this court on January 16, 1975, after the decision of the Supreme Court of the State of California became final. Such Remittitur reversed the trial court Judgment of May 2, 1972, and directed this court to enter judgment in accordance with the Supreme Court opinion.

The above entitled action came on for hearing pursuant to Petitioner's Notice of Motions filed herein on February 20, 1976, wherein Petitioner seeks the following: entry of judgment in accordance with the Order, Judgment and Remittitur of the Supreme Court of California, restitution of pension monies received by Respondent since this court's former judgments and to which the Supreme Court held

Petitioner had a community property interest; interest on such sums; and attorneys' fees. Respondent filed a counter motion on March 5, 1976, seeking to modify child support for the minor daughter of the parties, MARGARET LISA MILHAN, born February 14, 1962. The issues raised by the foregoing motions were orally argued before the court on March 17, 1976, and April 1, 1976, the Honorable Arden T. Jensen, Judge, presiding. Thereafter both parties submitted further written argument and authorities and the matter was submitted for the court's decision.

The court issued its Memorandum of Intended Decision on March 15, 1977. The Memorandum of Intended Decision was orally argued before the court on April 11, 1977.

Petitioner MARY LEE PASLEY (MILHAN) has appeared by her counsel, Jeffrey C. Nelson of Cavalletto, Webster, Mullen & McCaughey. Respondent HARRY LLOYD MILHAN has appeared by his counsel, Gary R. Ricks of Price, Postel & Parma.

At hearings following Petitioner's motions of February 20, 1976, and Respondent's motion of March 5, 1976, evidence both oral and documentary was introduced, and the cause was submitted for decision. After deliberation, the court now makes the following findings of fact and conclusions of law in determination of all issues of fact material to the judgment of this matter:

FINDINGS OF FACT

1. As a product of his Navy service, during the course of the marriage of Petitioner and Respondent, Respondent became entitled to Navy retired pay, payments which he began receiving upon his retirement, which retirement occurred prior to the time Petitioner filed for divorce on December 27, 1968.

2. Respondent has received monthly payments of Navy retired pay since his retirement and will continue to receive such payments until the time of his death.

3. The amount of Respondent's monthly retired pay has been subject to periodic adjustments based upon changes in the cost of living.

4. Respondent has not as of yet made payment to Petitioner of any of the retired pay he has received since Petitioner filed for divorce.

5. Respondent's Navy retired pay accrued in the full gross amount of Thirty-Five Thousand One Hundred Eleven and 31/100 Dollars ($35,111.31) for the period from the court's Judgment dated May 2, 1972, through February 1976, of which Petitioner's one-half (½) interest is Seventeen Thousand Five Hundred Fifty-Five and 65/100 Dollars ($17,555.65).

6. The Navy retired pay is currently payable to Respondent in the full gross amount of Eight Hundred Seventy-two and 59/100 Dollars ($872.59), of which Petitioner's one-half (½) interest is Four Hundred Thirty-six and 30/100 Dollars ($436.30).

7. During the course of the marriage of Petitioner and Respondent, Respondent obtained from the payment of community property funds, Navy Mutual Aid Association Life Insurance Policy No. 34792, having a cash value at the date of trial of Two Thousand Two Hundred Ninety-Three Dollars ($2,293.00), and National Service Life Insurance Policy No. V-1914-27-51, having a cash value at the date of trial of Two Thousand One Hundred Ninety Dollars ($2,190.00).

8. Respondent has community property assets from which he can satisfy Petitioner's community property interest in the National Service Life Insurance and Navy

Mutual Aid Association policies, which is a sum of Two Thousand Two Hundred Forty-One and 50/100 Dollars ($2,241.50).

9. Respondent has the current ability to pay Two Thousand Two Hundred Forty-One and 50/100 Dollars ($2,241.50) plus interest thereon for Petitioner's community property interest in the policies described in paragraph 7 above, at the rate of One Hundred Dollars ($100.00) per month on the first day of each month commencing April 1, 1977, until paid in full.

10. Respondent has the current ability to pay at least Two Hundred Dollars ($200.00) per month, commencing April 1, 1977, toward the sum of Seventeen Thousand Five Hundred Fifty-Five and 65/100 Dollars ($17,555.65) which is Petitioner's one-half (½) of the Navy retired pay which accrued between May 2, 1972, and February 1976.

11. Pursuant to this court's Judgment of May 2, 1972, Respondent was ordered to pay to Petitioner the sum of One Hundred Fifty Dollars ($150.00) per month for the support and maintenance of MARGARET LISA MILHAN. No change in circumstances has occurred that warrants a reduction in that amount.

12. It is appropriate that Respondent pay interest on the Judgment from January 16, 1975, as to retried pay Petitioner is entitled to receive and payments for Petitioner's interest in the National Service Life Insurance Policy and Navy Mutual Aid Association Policy.

13. Restitution to Petitioner of her community property share of Respondent's Navy retired pay will not be inequitable, and restitution will not result in unjust enrichment to Petitioner.

14. Petitioner incurred attorneys' fees in the above entitled matter and the reasonable value of the services per-

formed by her attorneys is no less than One Thousand Five Hundred Dollars ($1,500.00), and Respondent has the ability to pay such amount.

CONCLUSIONS OF LAW

1. Respondent's Navy retired pay is the community property of the parties.

2. Petitioner shall have judgment against Respondent for restitution of one-half (½) of the United States Navy retired pay received by Respondent after May 2, 1972, when judgment was entered dividing the community property.

3. Execution of the Judgment with respect to restitution of Petitioner's one-half (½) interest in the Navy retired pay accruing between May 2, 1972, and February 1976, which is a sum of Seventeen Thousand Five Hundred Fifty-Five and 65/100 Dollars ($17,555.65), shall be stayed so long as Respondent shall make payments in a minimum amount of Two Hundred Dollars ($200.00) per month toward said Judgment, which payments shall commence April 1, 1978, and be paid on the first day of each and every month thereafter for a period of five years. Execution shall order April 1, 1983, if said Judgment has not been paid in full before that date.

4. Respondent shall pay Petitioner one-half (½) of the gross amount of United States Navy retired pay to which he was entitled for the period commencing with March 1976 and ending upon the date of this court's Judgment and one-half (½) of the gross amount of such pay to which he is entitled as he receives payment of such benefits.

5. Restitution to Petitioner of her community property share of said retired payments will not be "inequitable" and that restitution will not result in unjust enrichment to Petitioner.

6. Respondent shall pay Petitioner the lawful rate of interest on a judgment on one-half (½) the gross amount of retired pay to which he became entitled from and after May 2, 1972, which interest shall be computed from January 16, 1975, the date the Supreme Court Remittitur was filed with the clerk of the Superior Court for all sums received before that date, and from the date of receipt for all sums to which Respondent was entitled after that date.

7. Petitioner shall have judgment against Respondent in the amount of Two Thousand Two Hundred Forty-One and 50/100 Dollars ($2,241.50); representing one-half (½) of the cash surrender value, as of the date of trial, of the National Service Life Insurance Policy and the Navy Mutual Aid Association Policy. Respondent shall not surrender or otherwise impair those policies in order to satisfy Petitioner's entitlement, but shall pay out of the other community property, which has been found to be adequate for such payment. Execution of this portion of the Judgment shall be stayed so long as Respondent shall pay minimum monthly payments of One Hundred Dollars ($100.00) toward said Judgment, which payments shall commence April 1, 1977, and continue until payment is made in full.

8. Respondent shall pay Petitioner the lawful rate of interest on a judgment on Petitioner's one-half (½) community property interest in the value of the National Service Life Insurance and Navy Mutual Aid Association policies, which interest shall be computed from January 16, 1975, the date the Supreme Court Remittitur was filed with the clerk of this court.

9. Respondent shall not be entitled to a modification of the child support payable for the support of MARGARET LISA MILHAN.

10. Respondent shall pay Petitioner the sum of One Thousand Five Hundred Dollars ($1,500.00) toward the payment of Petitioner's attorneys' fees.

Let Judgment be entered accordingly.

DATED: March 7, 1978.

/s/ ARDEN T. JENSEN
Judge of the Superior Court